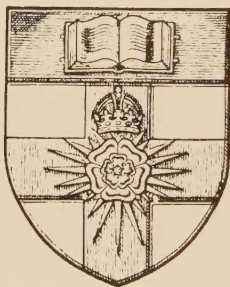


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CASES
DETERMINED BY THE
CHANCERY DIVISION
AND IN
LUNACY
AND ON APPEAL THEREFROM IN THE
COURT OF APPEAL.

In re FIELDWICK.
JOHNSON *v.* ADAMSON.

[1907 F. 1843.]

C. A.
1908

Oct. 28.

Married Woman—Will—Appointment—Exercise of General Power—Separate Estate—"Liable for her Debts or other Liabilities"—Jewellery—Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 1, sub-ss. 3 and 4; s. 4.

By a marriage settlement of June 2, 1890, the testatrix on her marriage with Mr. Adamson assigned a reversionary interest to trustees upon trust, after the fund had been received by them, upon her request to raise thereout a sum not exceeding 7000*l.* and pay the same to her for her separate use, but so that she should not have power to alienate or charge her interest in the 7000*l.* during coverture, and then upon trusts under which she took a general power of appointment.

By an indenture of January 29, 1891, in consideration of 10,000*l.* advanced by A. to Mr. Adamson, he covenanted to repay the same and interest, and the testatrix covenanted that when the reversionary interest fell in she would immediately request the trustees to raise and pay to her 4000*l.*, and that she, her executors or administrators, would pay it over to A., or so much thereof as should be required to satisfy the amount then due. Mr. Adamson died, and on her second marriage with Mr. Fieldwick the testatrix executed a new settlement of her reversionary interest upon trusts under which she had a general power of appointment. The reversionary interest fell into possession in 1901. The testatrix by her will exercised her power of appointment and thus made the fund liable for her debts and other liabilities under s. 4 of the Married Women's Property Act, 1882. She died in 1907. Only about 1200*l.* of the 10,000*l.* had been repaid, and A. now claimed to be paid out of the testatrix's estate the 4000*l.* under the covenant contained in the deed of January 29, 1891. It was admitted that owing to the

C. A.

1908

FIELDWICK,
*In re.*JOHNSON
v.
ADAMSON.

restraint on alienation contained in the first settlement the covenant was inoperative as a charge :—

Held, that inasmuch as on the evidence the testatrix had no separate estate, in respect of which she could be supposed to have contracted, at the time when she made the covenant, it did not constitute a contract with respect to her separate property for breach of which an action for damages would lie against her estate.

In re Ann, [1894] 1 Ch. 549, overruled.

APPEAL from Parker J.

Originating summons by the executor of the testatrix Mrs. Fieldwick to ascertain whether he ought in the administration of her estate to pay to Mrs. F. C. Adamson a sum of 4000*l.* out of funds over which the testatrix had exercised a general power of appointment.

Mrs. Fieldwick was twice married—first, in 1890, to Mr. Adamson, who died in 1894, and secondly, in 1898, to Mr. Fieldwick, who survived her. By a settlement of June 2, 1890, made on the occasion of her first marriage, the testatrix assigned to trustees her reversionary interest expectant on the death of her mother in the residuary estate of her grandfather upon trust, after the fund should have been received by them, upon her request to raise thereout a sum not exceeding 7000*l.* and pay the same to her for her separate use, but so that she should not have power to alienate or charge her interest in the 7000*l.* during coverture, and subject to the trust aforesaid upon trust to pay the income of the trust funds to her for life without power of anticipation during any coverture, and after her death upon trusts therein mentioned if her husband should be still living, and after the death of the testatrix and her husband upon trust for the issue of the marriage, and subject to these trusts in trust for such person or persons and purposes as the testator should either during the then intended coverture or afterwards whether covert or sole by will or codicil appoint, and in default of appointment if the testatrix should survive Mr. Adamson in trust for her absolutely, but so that she should not have power to alienate or charge her expectant interest during coverture.

By an indenture of January 29, 1891, made between Mr. Adamson of the first part, his wife the testatrix of the second part, and Mr. Adamson's mother, Mrs. F. C. Adamson, of the third part,

after reciting the settlement, it was witnessed that in consideration of 10,000*l.* advanced by Mrs. F. C. Adamson to Mr. Adamson he covenanted to repay that sum and interest in the meantime, and the testatrix covenanted with Mrs. F. C. Adamson that she would immediately upon the death of her mother request the trustees of the settlement to raise 4000*l.* and pay the same to her, and that she, her executors or administrators, would immediately on the receipt of the 4000*l.* pay the same to Mrs. F. C. Adamson, her executors, administrators, or assigns, or so much thereof as should be required to satisfy the amount then due upon Mr. Adamson's covenant.

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Mr. Adamson died in 1894, and on her marriage with Mr. Fieldwick the testatrix executed another marriage settlement, dated January 26, 1898, and thereby assigned her said reversionary interest to trustees upon certain trusts under which the testatrix was to receive the income for life for her separate use without power of anticipation, and subject thereto in trust for such person or persons and for such purposes as she should while discovert by deed or whether covert or discovert by will or codicil appoint, and in default of appointment upon trusts therein mentioned. On December 20, 1899, Mr. Fieldwick by deed surrendered his interest in the trust funds. The reversionary interest the subject of the settlement fell into possession on the death of the testatrix's mother in September, 1901.

The testatrix had no children by either marriage, and by her will of March 31, 1904, to which she made codicils in February and March, 1906, she executed her general power of appointment in favour of her adopted daughter, Miss Marie Joan Fieldwick, an infant, and Miss E. McGrath. The testatrix died on June 18, 1907.

Mrs. F. C. Adamson claimed that under the covenant by the testatrix contained in the deed of January 29, 1891, she was entitled to a charge upon or to be paid out of the funds subject to the trusts of the settlement of June 2, 1890, the sum of 4000*l.* She stated that only about 1200*l.* of the 10,000*l.* advanced by her had been repaid.

It was admitted that the restraint on alienation or charge by the testatrix of her interest in the 7000*l.* imposed by the settlement

C. A. of June 2, 1890, was effectual, and therefore that her covenant
1908 contained in the deed of January 29, 1891, was inoperative
FIELDWICK, to charge the 7000*l.* with the 4000*l.* The question then arose
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JOHNSON an action for damages would lie against the testatrix so far
v. as she could contract. In order to make out such a contract
ADAMSON. it was necessary to shew that the testatrix when she executed
the deed of January 29, 1891, was possessed of free separate
property in respect of which she would be deemed to have con-
tracted so as to make her after-acquired separate property also
liable. With this object affidavits were filed to the effect that on
her first marriage the testatrix received presents of valuable
jewellery, including a diamond tiara, and cheques, the value of
which was not given; and also a statement to the best of the
deponent's "knowledge information and belief" that her mother
gave her an allowance of 250*l.* a year. The executor in his
affidavit said that "to the best of his knowledge and belief" in
January, 1891, the testatrix had no property whatever except her
reversionary interest.

Parker J. held that he was bound to follow the decision of
Kekewich J. in *In re Ann* (1) and to hold that, inasmuch as the
testatrix had exercised a general power of appointment over the
fund and thus made it assets available for payment of her debts
and liabilities, Mrs. F. C. Adamson's claim must be satisfied out
of the fund, even though the testatrix might have had no separate
estate when she executed the deed of January 29, 1891; and,
further, that there was sufficient evidence to shew that she was
then possessed of separate property in respect of which she ought
to be deemed to have contracted.

Miss Fieldwick and Miss McGrath appealed.

Levett, K.C., and *W. H. Cozens-Hardy*, for the appellants.
This case is not affected by the Married Women's Property
Act, 1893. By the law as it stood in 1891, when this so-called
contract was made, a married woman was not liable in respect
of her separate property on any contract unless it was proved
that she had some separate property at the time when the

(1) [1894] 1 Ch. 549.

contract was made: *Palliser v. Gurney*. (1) Kekewich J. held in *In re Ann* (2) that that rule did not apply to property which was made assets within s. 4 of the Married Women's Property Act, 1882, by the exercise of a general power of appointment. We submit that that decision was wrong and ought to be overruled. The learned judge held, on the construction of s. 1, sub-ss. 3 and 4, and s. 4 of the Married Women's Property Act, 1882, that s. 4 must be read as if it provided that the appointed property became liable for her debts and liabilities in the same manner "as if it had been her separate estate at the time she entered into the contract or engagement," whereas the section says "in the same manner as her separate estate is made liable under this Act." He distinguished *Palliser v. Gurney* (1), and the result of his decision is that although there was no debt which could be enforced against the married woman during her life, yet that it could be enforced against her estate after her death. The answer to the decision is that there never was any debt in existence. It has never been followed except by Kekewich J. himself in *In re Hughes* (3), and is doubted in *Lush on Husband and Wife*, 2nd ed. p. 524. [They were stopped on this point.]

The onus is on the respondent to shew that the testatrix had separate estate on January 29, 1891, and she has not proved it. The evidence is given in an unsatisfactory manner, and there is nothing to shew that at that time the testatrix still retained her wedding presents. Even if she had them, the Court would not be warranted in assuming that she contracted in respect of them.

Frank Wright (*Upjohn, K.C.*, with him), for Mrs. F. C. Adamson. Assuming that the decision in *In re Ann* (4) is not one which the Court would pronounce now, it has stood for fourteen years without being dissented from and will not be lightly overruled. The reasoning of the learned judge is clearly given in his judgment, and we submit that it is right. But even if the decision is wrong we are entitled to recover on the covenant, for the evidence shews that in January, 1891, the testatrix had valuable jewellery and other separate property.

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(1) (1887) 19 Q. B. D. 519.
(2) [1894] 1 Ch. 555,

(3) [1898] 1 Ch. 529.
(4) [1894] 1 Ch. 549,

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[FARWELL L.J. There is nothing to shew that her husband, who had to borrow this large amount, had not induced her before that date to give up her wedding presents to him.]

It is a reasonable inference that she contracted in respect of this separate property. Otherwise the covenant would be idle. This is a carefully drawn document and ought to be construed so as to give some effect to the covenant. At all events it is possible that she covenanted as owner of the property, and that is sufficient: *Leak v. Driffield* (1); *Bonner & Co. v. Lyon*, (2)

Christopher James, for the executor.

No reply was called for.

COZENS-HARDY M.R. This is an appeal from a decision of Parker J. which decided two points, one of them an interesting point. On the first the learned judge followed, and as a judge of first instance he was quite right in following, the decision of Kekewich J. in *In re Ann* (3) without expressing an opinion upon it. The second point was not a question of general importance, but one which depended upon the evidence in the particular case before him. The decision in *In re Ann* (3) was a decision upon the meaning and effect of s. 4 of the Married Women's Property Act, 1882. In order to appreciate that section it is, of course, necessary to read the earlier sections of the Act. It is said in s. 1, sub-s. 1, that "a married woman shall, in accordance with the provisions of this Act, be capable of acquiring, holding, and disposing by will or otherwise, of any real or personal property as her separate property, in the same manner as if she were a feme sole, without the intervention of any trustee." By sub-s. 2 "a married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a feme sole." Sub-s. 3 provides that "every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property, unless the contrary be

(1) (1889) 24 Q. B. D. 98.

(2) (1890) 38 W. R. 541.

(3) [1894] 1 Ch. 549.

shown." By sub-s. 4, "Every contract entered into by a married woman with respect to and to bind her separate property shall bind not only the separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire." Sub-ss. 3 and 4 have since been repealed by the Married Women's Property Act, 1893, but before that happened it was held by the Court of Appeal in *Palliser v. Gurney* (1) and *Stogdon v. Lee* (2), that a condition precedent of the liability of a married woman in respect of after-acquired separate property was this, that it must be shewn that at the date of the contract she had separate property with respect to which the contract was entered into, and that unless that was proved the creditor had no right to get judgment against her, even though she might have come into a large fortune for her separate use immediately after making the contract. That is no longer the law, for the Married Women's Property Act, 1893, provides (s. 1) that "Every contract hereafter entered into by a married woman, otherwise than as agent, (a) shall be deemed to be a contract entered into by her with respect to and to bind her separate property whether she is or is not in fact possessed of or entitled to any separate property at the time when she enters into such contract." We are, however, dealing with the old law apart from the Act of 1893. The earlier sections of the Act of 1882 had only given a married woman power to hold separate property and the capacity to enter into contracts and incur liabilities which would have to be satisfied out of her separate estate. But there might be other property which, although it formed no part of her estate, she had power by the exercise of a general power of appointment to make assets for the payment of her debts. In the case of a man property over which he exercises a general power of appointment becomes liable for payment of his debts in the same way. Sect. 4 of the Act of 1882 says that "the execution of a general power by will by a married woman shall have the effect of making the property appointed liable for her debts and other liabilities in the same manner as her separate estate is made liable under this Act." That section only says

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(1) 19 Q. B. D. 519.

(2) [1891] 1 Q. B. 661.

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that the appointed property shall be liable "in the same manner as her separate estate is made liable under this Act." Under the Act as interpreted by the decisions to which I have referred her after-acquired separate property was only liable in respect of contracts made at a time when she had separate property; and with all respect to Kekewich J., I am unable to follow his judgment in *In re Ann* (1), which in effect holds that property appointed under a general power by will is subject to the liabilities of a married woman under a contract made at a time when she had no separate estate, although it would not have been subject to them if it had been her own property. It seems to me that that is contrary to the language and intention of the Act, and the learned judge was anticipating the legislation of 1893 by introducing further words into the section rather than construing its provisions. For these reasons I think that the decision of Parker J., following that of Kekewich J. in *In re Ann* (1), and, as I gather, contrary to his own view, cannot on that point be supported, and that we are bound to overrule his decision and the decision in *In re Ann*. (1)

But there is another point in this case. It is said that there is proof that the testatrix at the time when she made the covenant had separate estate in respect of which she ought to be deemed to have entered into the contract. That is a question of evidence. The burden of proving that fact lies admittedly upon the person who seeks to prove against the estate, and that onus has not, in my opinion, been discharged. The lady's executor says that to the best of his belief she had no further separate estate. She was married in May, 1890, and in 1891 her husband was in such a position that he borrowed 10,000*l.* The wife joined in the transaction and sought to do that indirectly which she could not do directly. There was a power in the marriage settlement of June, 1890, which enabled the trustees after the death of the testator's mother to raise 7000*l.* and pay it to the testatrix, but so that she should not have power to alienate or charge her interest during coverture. Having regard to s. 19 of the Act, which I do not specially comment upon, she could not by the deed which she executed in

(1) [1894] 1 Ch. 549.

January, 1891, bind that particular 7000*l.*, but it is now sought to make her liable for breach of that which is described as her covenant to do that which of course she could not do. It is said that it must be presumed that she had separate property at the date of this mortgage in respect of which her covenant was entered into, because she had had some valuable wedding presents given to her on her marriage in the previous year in the shape of cheques and jewellery. Probably by that time the cheques were all spent, and I am by no means satisfied that the diamond tiara had not also been got rid of, if indeed it ever existed, and the burden of proving that being upon the claimant, I think she has wholly failed to establish it. There is very good sense in the judgments in *Leak v. Driffield*. (1) It is not reasonable to hold that within the Act of 1882 the testatrix intended to enter into a contract of this kind in respect of her separate estate merely because she had things suitable to her rank in life and personal jewellery which she would use for her own purposes. She cannot be taken to have looked upon these things as property in the sense in which some persons buy jewels, that is, as assets on which they desire and intend to raise money. This appeal must succeed on both grounds, namely, first, that the decision in *In re Ann* (2) is wrong, and, secondly, that there is no evidence that at the time of the contract the testatrix had any separate property, and that, even if she ought to be presumed to have had property of the kind alleged to have been in existence, it was not separate property of a kind in respect to which the contract must be deemed to have been entered into.

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FLETCHER MOULTON L.J. I am of the same opinion. It is clear that the decision in *In re Ann* (2) cannot be supported. The learned judge arrived at it by inserting in s. 4 words which not only are not there, but are not suggested by anything else in the Act. He held that property over which a married woman has exercised a general power of appointment is by the Act to rank as property possessed by her at the date when she entered into the contract. There is nothing in the world to warrant the Court in reading such words into the section. Putting that

(1) 24 Q. B. D. 98.

(2) [1894] 1 Ch. 549.

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decision aside and coming to the facts of this case, I think there is evidence, but very slight evidence, that the testatrix possessed some separate property at the date of the contract. When I say this I refer to property of a particular character, namely, jewels. Not even a presumption is raised that she had any money. The liability sought to be fixed on her estate is in respect of a loan of 10,000*l.* to her first husband, in respect of which, in certain events, she would by the contract have made her future property liable to the extent of 4000*l.* The Court, under these circumstances, cannot come to any other conclusion than this, that that liability was not entered into by her with respect to, or to bind, that separate property. It is absurd to suppose that she entered into that contract with the idea that she might have to meet the liability by selling her jewels. I have no hesitation in coming to the conclusion that this was not a contract entered into with respect to such separate property as she possessed, and that therefore it never resulted in a liability. The appeal must be allowed.

FARWELL L.J. I agree. The construction of the Act of 1882 appears to me to present no reasonable difficulties. Sect. 4 says that "the execution of a general power by will by a married woman shall have the effect of making the property appointed liable for her debts and liabilities in the same manner as her separate estate is made liable under this Act." I ask myself, How is that separate estate made liable under this Act? The answer to that question is that under *Palliser v. Gurney* (1) and other cases it is only liable if the claimant can prove, the onus being on him, that the testatrix had separate estate at the time when her engagements were entered into. The decision in *In re Ann* (2) cannot be supported, for Kekewich J. has disregarded the decision in *Palliser v. Gurney* (1) and the words of the Act. The learned judge himself appears to have felt some doubt as to the correctness of the decision, for in *In re Hughes* (3) he spoke of *In re Ann* (2) as a case of some peculiarity, and said that it might be that the non-application to it of the decision in *Palliser v. Gurney* (1) might be questioned. Upon the other point I desire

(1) 19 Q. B. D. 519.

(2) [1894] 1 Ch. 549.

(3) [1898] 1 Ch. 529, 535.

to say this. This is a final determination of the rights of the parties, and affidavits on information and belief are not admissible. There is practically no evidence to discharge the onus cast upon the claimant to shew that the testatrix had any separate property at the date of the contract. It is not enough to say she had jewels. The test put by Mathew J. in *Leak v. Driffield* (1) is, I think, a very sensible and accurate one. He says "a married woman's property is not bound by her contracts unless she can be supposed to have contracted with reference to it." To apply that test here, no one could suppose that in this case the testatrix intended to bind her jewellery, if she had any, as security for 4000*l*. The later decision of the Divisional Court, *Bonner & Co. v. Lyon* (2), may be supported because the lady in that case was in the habit of speculating in furs and jewels which she bought and sold from time to time.

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Solicitors: *Budd, Johnson & Jecks; Allen, Edwards & Oldfield.*

(1) 24 Q. B. D. 98, 101.

(2) 38 W. R. 541.

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FARQUHAR v. NEWBURY RURAL DISTRICT COUNCIL.

[1907 F 876.]

Highway—Dedication—Public User—Presumption—Settled Land—Tenancy for Life with Remainder in Fee—Churchway—Diversion—Limited Dedication.

Where land is settled upon a tenant for life with an immediate remainder to a tenant in fee, both of whom are sui juris, it is competent for the tenant for life and remainderman together to dedicate to the public a road over the settled land.

Accordingly, where land was thus settled and was under the control and management of the remainderman, and a new road was laid out by him across the land and was treated by him as a public road, and since the date of its construction, more than sixty years ago, the road had been used by the public in such a way as would have compelled the Court as against an owner in fee to infer dedication, but there was no evidence that the tenant for life, who had been dead for fifty years, had any knowledge of the user of the road by the public :—

Held, that the Court ought to infer from the facts that there had been a dedication to the public by the tenant for life and remainderman.

A landowner desiring to divert or improve a churchway by laying out a new road in substitution therefor cannot confer on the public such rights only over the new road as existed over the churchway.

Decision of Warrington J. affirmed.

APPEAL from a decision of Warrington J. (1)

The action was brought for a declaration that a roadway across the Shaw House estate, near Newbury, was not a public highway. The plaintiff was the owner and occupier of the Shaw House estate, which was situate between the villages of Shaw and Donnington. Since the year 1632 these villages formed one parish with one church, St. Mary's, which was close to Shaw House and the village of Shaw. The plaintiff, who bought Shaw House in 1905, admitted that the inhabitants of Shaw and Donnington were entitled to use the road as a churchway for church purposes, but denied that the public had any right to use it, and in order to assert her right she locked two gates which stood across the road. The defendant council disputed her right to close the road and removed the locks, whereupon the plaintiff commenced this action.

(1) [1908] 2 Ch. 586.

It appeared that from 1753 to 1895 the Shaw House estate was in settlement, and that in 1836 Dr. Penrose was tenant for life under the settlement, and his nephew H. R. Eyre tenant in tail in remainder. In that year Eyre disentailed and limited the estate, subject to Dr. Penrose's life estate, to himself in fee simple, and in 1849 he resettled it on his marriage. From 1836 until his death in 1851 Dr. Penrose, who was a very old man, never resided at Shaw House, and Eyre took upon himself the management and control of the property.

From time immemorial there had been a churchway leading across the estate to the church from a public highway known as Shaw Lane, whereby the church was approached from the village of Shaw, which was situate to the south-east of Shaw House, and also a churchway across the estate to the church from a public highway known as Love Lane, whereby the church was approached from the village of Donnington, which was situate to the west or north-west of Shaw House. For many years the church paths led to the north-east side of the church, and were for the most part merely undefined tracks. In 1841 the church was rebuilt, and in 1842 Eyre, with the assistance and partly at the expense of the tenants of the estate and other parishioners, diverted these churchways so as to lead to the south-west side of the church, and laid out a new road suitable for vehicular traffic (being the road in question in this action) in substitution for the old tracks.

The further facts found by Warrington J. were shortly as follows :—

From the time when the road was made up it was used by any one who desired to use it on foot and on horseback and with all kinds of vehicles, and since that time until the closing of the gates by the plaintiff there had been no serious interference with that user; but since 1876 some objection had been raised in a few instances to the user of the road by certain classes of traffic, particularly traction engines. Eyre himself regarded it as a public road and acquiesced in the user of it by the public until his death in 1872, and it had been from time to time repaired by the parish authorities. It was not proved that Dr. Penrose ever had any knowledge of the user of the road by the public.

The learned judge held that it was competent for the tenant for

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life in possession and the tenant in fee in remainder, both of whom were sui juris, together to dedicate to the public a road over the settled land, and that the inference to be drawn from the evidence was that the road in question had been so dedicated.

The plaintiff appealed.

Rowden, K.C., Radcliffe, K.C., and Whinney, for the appellant. There can be no dedication except by a party in possession competent to bind the fee simple. In no previous case has dedication ever been presumed against a tenant for life and remainderman. To constitute a dedication it is essential, first, that there should be a competent dedicator; secondly, that he should have the animus dedicandi. Both those requisites are wanting in the present case. The intention of Mr. Eyre in laying out a new road in 1842 in substitution for the old church track was to improve the churchway, not to dedicate the road to the public.

[FARWELL L.J. It was not competent to him to divert the churchway, since it depends for its origin upon immemorial custom.]

It is a strange result if the act of improving a churchway, which belongs not to all the King's subjects, but to the inhabitants of the parish—Bacon's Abridgement, 7th ed. vol. iv. p. 215; *Batten v. Gedye* (1); *Brocklebank v. Thompson* (2)—amounts to a dedication of the way to the public at large. It is submitted that it is competent to a landowner to divert a churchway, even though it originates in immemorial custom, provided that the ecclesiastical authorities and the parishioners do not object; but assuming that that contention is not well founded, then the act of diversion is simply void. If the intention of the landowner was to continue an existing right in a different manner, the effect of an abortive act done in pursuance of that intention would be not to create a new and more extensive right in the public, but to relegate the public to their old right, for there can be no dedication to the public without an intention to dedicate: *Poole v. Huskinson*. (3) Where a specific dedication is relied on a

(1) (1889) 41 Ch. D. 507.

(2) [1903] 2 Ch. 344.

(3) (1843) 11 M. & W. 827.

specific intention to dedicate must be shewn, and that differentiates this case from the long line of authorities where dedication has been presumed from long user. There is here no evidence that Dr. Penrose ever knew that this road was going to be dedicated to the public, and in fact dedication was not in Eyre's mind.

Cripps, K.C., Macmorran, K.C., and George Henderson, for the respondents, the defendant council, were not called upon.

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COZENS-HARDY M.R. The only question to be decided in this case is whether a certain road which de facto has been in existence as a road actually constructed for more than sixty years and which runs through the plaintiff's park is or is not a public highway. It is argued as a point of law that there can be no dedication if the land over which the right of the public is claimed is vested in a tenant for life with remainder in fee. I entirely dissent from that proposition. Warrington J. treats it as a matter of course that the tenant for life and the remainderman together could have dedicated this road to the public. I assent to that absolutely and without qualification. The tenant for life alone, of course, could not bind the remainderman. The remainderman, not being in possession, could not dedicate without the concurrence of the tenant for life. But having regard to the fact that sixty years ago this road was laid out by the remainderman, partly at his own expense and partly by means of money which he induced others to subscribe, and to the fact that at that date the tenant for life was a very old gentleman resident in a different county, I think we ought to assume that that was done by the remainderman with the knowledge and approval of the tenant for life. The learned judge arrives at the same result in another way, and I in no way differ from his view. He concludes from the evidence that the remainderman, Mr. Eyre, was really put in control and management of the estate, and that he represented the tenant for life, who was his uncle, for all purposes. When you look at the vestry minute of April 15, 1842, which was just about the time when this road was laid out, and when you remember that the old parish church had been pulled down and a new one erected, and that the formation of the road was part of an arrangement made in



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connection with the rebuilding of the church, it is very significant that at this critical period Mr. Eyre "consents to put in repair such part of the churchyard fence as belongs to the Shaw Place Estate." He undoubtedly took upon himself to represent the owner of the estate in this matter, and on that ground alone, quite apart from the presumption of acquiescence and assent, I feel no doubt that there was a valid dedication of this way to the public. But it is said that the Court ought not to presume a dedication because it was in the minds of the parties that the road should be in substitution for that which was merely a churchway, and that such rights as existed over the churchway are the only rights which can exist over the substituted way. I think there are several answers to that. In the first place it is impossible to confer upon this road such rights, and such rights only, as existed over the churchway. The law does not allow it. A churchway is a way the rights over which exist by custom in favour of a limited class of the public, and no landowner can dedicate a road with only such rights as the public would have over a churchway. But then it is argued that the whole transaction was a nullity. If so, the old church path remains and the public have no rights at all over this road. That again I am entirely unable to appreciate. It is in contradiction of the statement of claim, which assumes and asserts that there are public rights over this new road. I prefer to put the case as it was put by Warrington J. and to say that more than sixty years ago persons competent to dedicate to the public laid out in the most formal way a road of adequate width for vehicles, that from that time forward this road has been used by all members of the public desiring to use it, whether on foot or on horseback or in vehicles of any kind, without any interruption worthy of mention, and that in some instances at least it has been actually repaired at the expense of the parish. When you find that state of facts—long user coupled with the existence of persons competent to dedicate—I decline to look into what was or was said to be actually in the mind of the person so dedicating. I think the presumption of law follows arising from the long user that that took place which was necessary to give the public any right at all, namely, a dedication



to the public not as a church path, but as an ordinary highway. For these reasons I am of opinion that the judgment of the learned judge was right and that this appeal should be dismissed with costs.

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FLETCHER MOULTON L.J. I am of the same opinion. Here is a road which for more than sixty years has been in public general use. The defendants having established this are in a position to claim it as a public highway unless the plaintiff can shew that the state of the title of the land over which this road goes was such during that period that there can have been no valid dedication, or in other words that there were no persons capable of validly dedicating it. The plaintiff seeks to do this, but her counsel are obliged to admit that for a period of some thirteen years the land was in the possession of Dr. Penrose as tenant for life, with Mr. Eyre as remainderman in fee. It is true that they suggest that it is impossible that there could be dedication under those circumstances, but they are obliged to admit that this contention cannot be sustained in law because there might be dedication by those two parties by deed. The consequence is that they are obliged to say that the facts shew that it is impossible that there could be dedication by either of them with the acquiescence of the other. I do not see how they arrive at that. We know that the remainderman took an active part in the formation of this road. His knowledge of the formation and public user of this road is admitted, his acquiescence certainly can be presumed, and I feel no difficulty in presuming the knowledge and acquiescence of the tenant for life also. Therefore there is here no impossibility which rebuts the presumption on which the defendants rely. Then, as a second method of rebutting the presumption of dedication, it is said on behalf of the plaintiff that this road was made in substitution for an old church path, and that therefore you must presume that it was the intention of the parties making it that the new road should be used only as a church path. I can find no evidence pointing to this road having been regarded by the parties who made it as being only a church path. It seems to me to be a mere suggestion of counsel. Even if there were some evidence, I think

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that such matters would not be strong enough to overcome the presumption on which the defendants rely. The plaintiff must shew that it was impossible that dedication could have taken place, not that it was possible that it did not take place, and therefore no such answer as that suggested would be sufficient. But, looking at the facts of the case, I have not the slightest difficulty in coming to the conclusion that this road was made to induce the inhabitants of the parish (to whom I will suppose this churchway belonged) to go by this definite public path instead of crossing the meadows along the line of the old churchway. It was the essence of the scheme that this should be a public way, and accordingly it was made in a manner which points to its being fitted for general use, and it has, with the knowledge of all the parties concerned, been used by the public as a public way during this long period of time. I am satisfied that this is the explanation in fact of that which has happened, and it entirely agrees with the presumption on which the defendants rely and upon which I think the Court is bound to act.

FARWELL L.J. I am of the same opinion. Dedication by an owner is a question of title and of intention. As to title I feel no difficulty in holding that the tenant for life and remainderman together can dedicate. The tenant for life alone cannot, nor can any presumption readily be drawn from non-interference by the remainderman, because it is difficult to see what the remainderman can do. He cannot bring trespass, and it would probably be necessary to prove something more than mere acquiescence. But the case is different when the remainderman makes the alteration himself, and the tenant for life being an old man, his uncle, resident in a different county, takes no part in the management of the estate, but leaves it to the management of the remainderman, who had the most interest in it. This road was made sixty years ago, and at this distance of time direct evidence on the point is almost impossible to obtain. To my mind the inference that the remainderman was doing this with the concurrence and on behalf of the tenant for life, who could have prevented it, as well as of himself, is really irresistible. It is therefore a simple case of dedication, so far as title is

concerned, by the owners of the fee. A man cannot dedicate that which is not his own, but there is nothing to prevent several owners who between them own the entire fee from dedicating.

As to intention, it is said that all Mr. Eyre meant to do was to make a church path. If the dedication had been by deed and had been expressed in terms to be for a church path only, it may be that that, being invalid (owing to the impossibility of creating a church path at the present day), would have let in the principle of *Poole v. Huskinson*. (1) But we are dealing here with a different state of facts. There was a church path which it was desired to get rid of. A church path is one which exists by custom, and the custom being for the inhabitants of the parish and arising from user from time immemorial, cannot now be created anew. The landowner, being desirous of getting rid of that church path, cast about for the best way of doing it. What he could do was to make a public way which would be more convenient, so that for their own sakes the parishioners, who could not otherwise be deprived of their church path, would use it. Why should we infer that there was only an intention to make a church path? The evidence of Canon Nelson, the rector of the parish, on which the plaintiff mainly relied, shews that, parishioner or not, everybody who desired to do so, used this road, and used it for all purposes. Having regard to the difficulties which have only arisen in these later days, when public highways are used by motor cars, traction engines, and the like, the conclusion I draw is that this is really an afterthought arising from the modern user of the highway, and not from any intention to limit the user sixty years ago, when there were no such objectionable things in the place. My sympathy with the plaintiff cannot enable me to decide in her favour.

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Solicitors: *Radcliffe, Cator & Hood; Rawle, Johnstone & Co., for S. V. Pinniger, Newbury.*

(1) 11 M. &amp; W. 827.

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*Revenue—Estate Duty—Incidence—Personal Property—Exercise by Will of General Power of Appointment—Estate Duty payable in respect of Appointed Fund—“Property passing to Executor as such”—Legal and Equitable Assets—Finance Act, 1894 (57 & 58 Vict. c. 30) s. 6, sub-s. 2 ; s. 9, sub-s. 1.*

The estate duty payable in respect of personal estate appointed by will under a general power of appointment is not a charge upon the appointed property, but is payable by the executor out of the testator's personal estate.

So held by the Court of Appeal, reversing the decision of Parker J.

*In re Treasure*, [1900] 2 Ch. 648 ; *In re Maddock*, [1901] 2 Ch. 372 ; *In re Power*, [1901] 2 Ch. 659 ; and *In re Dodson*, [1907] 1 Ch. 284, overruled on this point.

*In re Moore*, [1901] 1 Ch. 691 ; *In re Dixon*, [1902] 1 Ch. 248 ; *In re Fearnside*, [1903] 1 Ch. 250 ; and *In re Orlebar*, [1908] 1 Ch. 136, followed.

MISS ALICE HADLEY had under the will of her late father a general power of appointment by will over a sum of 20,000*l.*, and by her will dated March 14, 1905, she appointed the 20,000*l.* as to 6000*l.* upon trusts for the benefit of Elsa C. Pearson, as to 6000*l.* upon trusts for the benefit of Ora F. Pearson, and as to 8000*l.* in trust for F. C. T. Hadley absolutely. The testatrix then gave all her real (if any) and personal property to her trustees upon trust to sell the same (subject to certain directions as to retaining some shares in Kynoch, Limited, and as to her furniture and a leasehold house) and out of the net proceeds “to pay all her funeral and testamentary expenses” and just debts, and to pay the defendant Gerard Hadley the sum of 100*l.* free of duty, and to retain her preference shares in Kynoch, Limited, so long as the trustees should think fit, and to pay the annual dividends of the same to the extent of 100*l.* to the defendant the Rev. J. P. Lewis during his life, free of duty, and to stand possessed of any surplus income beyond the 100*l.*, and also of the



corpus after the death of Mr. Lewis, on the trusts declared concerning residue. Subject to some provisions of a temporary nature as to the leasehold house (held on a short lease) and the furniture, the furniture was to sink into the residue, and the testatrix gave the residue as to one third upon trust for F. C. T. Hadley absolutely, and as to two other thirds upon trusts for the benefit of Elsa C. Pearson and Ora F. Pearson respectively.

The testatrix died on July 14, 1906; she had no real estate at the date of her death.

After payment of the testatrix's debts her estate exclusive of the 20,000*l.* was insufficient to pay in full the estate duty, including the estate duty in respect of the 20,000*l.*, and the legacy of 100*l.* and the annuity. Accordingly the executors and trustees of the will took out an originating summons to determine in effect out of what property the estate duty ought to be paid and how the deficiency should be borne.

The summons was heard before Parker J. on June 19, 1908.

*Sheldon*, for the applicants.

*C. Stafford Crossman*, for the defendants F. C. T. Hadley, E. C. Pearson, and O. F. Pearson.

*A. F. C. C. Luxmoore*, for the defendant Lewis.

*Tomlin*, for the defendant Gerard Hadley.

*Cur. adv. vult.*

July 2. PARKER J. In this case I have to express my opinion on the vexed question whether property appointed in exercise of a general power is "property passing to the executor as such" within the meaning of that expression as used in s. 9, sub-s. 1, of the Finance Act, 1894. If prior to the passing of this Act a lawyer had been asked what property on the death of a deceased person passed to his executor as such, there could in my opinion have been only one answer. He would have said, and I think rightly said, that property passing to the executor as such was property to which the executor derived title by virtue of his office, or, in other words, property to which he derived title by virtue simply of the grant of probate, and which would similarly have passed to an administrator to whom letters of administration had been

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granted. The distinction between such property and property to which an executor might derive title in some other way was well known, and was for many purposes of considerable importance. It was, for example, the test by which it could be determined whether any particular asset was a legal or an equitable asset for the purpose of paying the debts of a deceased person, and it was similarly the test as to whether probate duty was or was not payable under the Act 55 Geo. 3, c. 184. Property appointed in exercise of a general power clearly did not pass to the executor by virtue of his office or by virtue simply of the grant of probate. It was therefore an equitable asset for the payment of debts, and it was exempt from probate duty under 55 Geo. 3, c. 184, though under the later Act of 23 Vict. c. 15 it was, it is true, made subject to probate duty, such duty being expressly made payable out of the appointed property. In my opinion, if the Legislature uses in an Act of Parliament an expression which has at the date of the passing of the Act a well-defined technical meaning, there is a strong presumption that the expression as used in the Act is intended to bear the same technical meaning, though this presumption may, of course, be rebutted by intrinsic evidence to the contrary. By s. 9, sub-s. 1, of the Finance Act, 1894, the estate duty imposed by the Act is charged rateably on all the various properties in respect of which it is leviable, with the exception of property which passes to the executor as such. If, on the assumption that these words bear the technical meaning which they would have borne before the Act, a good reason can be suggested for this exception, the probability of their being intended to bear this meaning is greatly increased. In my opinion such a reason can be suggested. Estate duty, though imposed for the first time by the Act of 1894, takes the place of probate duty in respect of all property which was subject to probate duty before the Act was passed. The incidence of probate duty was well settled on property which passed to the executor as such; it was payable as an executorship expense and borne entirely by the residuary personal estate, so that neither specific nor pecuniary legatees were affected by it till the residue was exhausted. On property appointed in exercise of a general power it was, on the other hand, payable out of the appointed

property. But for the exception in s. 9, sub-s. 1, of the Finance Act, 1894, the incidence of the new duty which took the place of probate duty would, as between specific if not also pecuniary legatees on the one hand and residuary legatees on the other hand, have been different from the incidence of the probate duty. In my opinion the object of the exception was to prevent this result, and it admittedly does prevent it on any possible construction of the exception as to all property which passes to the executor as such within the technical meaning of those words. If, however, the meaning of the expression "property passing to the executor as such," as used in s. 9, sub-s. 1, be extended so as to include property appointed in exercise of a general power, the incidence of the estate duty on such property will be different from the incidence of the probate duty which it supersedes. It is impossible to suggest any reason why the Legislature, while intending to make the incidence of the estate duty the same as the incidence of probate duty as to one class of property, should intend to make it different as to another class of property passing to the executor. The very object of the exception, therefore, points to the conclusion that the expression "passing to the executor as such" was intended to be used in its technical signification. It is contended, however, that other parts of the Act shew a contrary intention, such contention being based mainly upon the words used in s. 8, sub-s. 3. This section and sub-section make the executor accountable for estate duty on all personal property, wheresoever situate, of which the deceased was competent to dispose at his death, but provides that he shall not be liable for any duty in excess of the assets which he has received as executor, or might but for his own neglect or default have received. The necessity of some limit to the liability of an executor for estate duty is, of course, obvious. He is accountable for the duty on many kinds of property which in some cases never can and in other cases never may come into his hands. For example, he is accountable for the duty on personal property over which the deceased had a general power which he has not exercised, though such property can never come to his hands, and also for the duty on personal property locally situate abroad, though he may be unable to recover such

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property. In limiting the executor's liability for duty it seems to me that the Legislature has adopted the ordinary account on the footing of wilful default as the standard by which an executor's liability is to be measured. The expression "as executor" in the phrase "assets which he has received as executor" refers to the character in which the assets are received, and not to the way in which the executor's title to receive them has arisen. The use by the Legislature in s. 9, sub-s. 1, which is directed to an entirely different object, of the expression "passing to the executor as such," in order to distinguish the particular manner in which the executor derives his title, cannot, in my opinion, be properly relied on as shewing an intention to limit the executor's liability to strictly legal assets, any more than the fact that his liability under s. 8, sub-s. 3, is not limited to legal assets can be properly relied on to extend the technical meaning of the expression "passing to the executor as such" so as to cover property which, strictly speaking, does not so pass. It seems to me that in each of the sections the Legislature adopts the technical expression which will most appropriately secure the object in view, and that there is no real difficulty in construing either expression as having its technical meaning, even though the words "as executor" in one section and "as such" in the other section may not denote or connote precisely the same idea. For these reasons I follow the cases of *In re Maddock* (1), *In re Treasure* (2), *In re Power* (3), and *In re Dodson* (4), rather than the cases of *In re Moore* (5), *In re Dixon* (6), *In re Fearnside* (7), and *In re Orlebar*. (8) The next question is whether the estate duty payable in respect of property appointed in exercise of a general power is a testamentary expense within the meaning of the directions contained in the will of the appointor for the payment of her testamentary expenses out of her residuary estate. On this point it seems to me that the decisions are all one way and that I am not at liberty to disregard them. I hold, therefore, that the duty in question is by virtue

(1) [1901] 2 Ch. 372.

(2) [1900] 2 Ch. 648.

(3) [1901] 2 Ch. 659.

(4) [1907] 1 Ch. 284.

(5) [1901] 1 Ch. 691.

(6) [1902] 1 Ch. 248.

(7) [1903] 1 Ch. 250.

(8) [1908] 1 Ch. 136.

of this direction payable out of residue. A direction to pay out of residue a duty which but for such direction would be payable out of the appointed fund is in effect a pecuniary legacy to the appointees of the amount of the duty. This legacy, in my opinion, is liable to abatement *pari passu* with other pecuniary legacies, though gifts in the nature of specific bequests are not liable to contribute towards its payment any more than they are liable to contribute to the payment of any other pecuniary legacy.

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The Court, being of opinion that according to the true construction of the Finance Act, 1894, the estate duty payable in respect of the appointed fund was in the absence of any direction in the will to the contrary a charge on the appointed fund, declared that upon the true construction of the will of the testatrix the estate duty on the appointed fund was a testamentary expense and a pecuniary legacy payable out of residue, and that in the event of a deficiency of the residue to pay the testatrix's funeral and testamentary expenses and debts such legacy ought to abate rateably with the other pecuniary legacies, but that gifts in the nature of specific legacies were not liable to contribute; and declared that the preference shares in Kynoch, Limited, or the proceeds of sale thereof, were, subject to the annuity of 100*l.* charged thereon, part of the residue.

F. E.

The appointees appealed from this decision so far as it decided that the estate duty in respect of the 20,000*l.* was, apart from any direction in the will, a charge upon the appointed fund.

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The appeal was heard on October 28 and 29, 1908.

*C. Stafford Crossman*, for the appellants. The question turns mainly on the construction of s. 9, sub-s. 1, of the Finance Act, 1894, and the meaning of the expression property passing to "the executor as such." If this appointed fund passed to the executor "as such," the estate duty is payable out of the general residue; if it did not pass to him "as such," the proper proportion of the duty is payable out of the fund itself. By s. 2, sub-s. 1 (*a*), estate



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duty is payable in respect of property of which the deceased was at the time of his death competent to dispose. By s. 6, sub-s. 2, the executor is to pay the estate duty in respect of all personal property of which the testator was competent to dispose at his death. Sect. 8 provides for recovering the duty, and by sub-s. 3 the executor is made accountable for the estate duty upon such personal estate to the extent of the assets which he has received as executor, or might but for his own default have received. By s. 8, sub-s. 4, where property for which the executor is not accountable passes on death, the person to whom it passes is accountable. By s. 9, sub-s. 1, a rateable part of the estate duty in proportion to the value of any property which does not pass to "the executor as such" is to be a first charge upon it.

I submit that this appointed fund passed to the executor "as such" and that the duty is payable out of the general personal estate. The testatrix was a person competent to dispose of the fund within s. 6, sub-s. 2, for she had a general power of appointment, and there is no doubt that in fact the property does pass to the executor. There have been conflicting decisions on the point, and they are collected in *Austen-Cartmell* on the Finance Acts, 4th ed. p. 82. The first case was *In re Treasure* (1), in which Kekewich J. held that the appointed property did not pass to the executor as such and that the duty was chargeable on the appointed fund. In *In re Moore* (2) Buckley J. came to a different conclusion and held that the duty was payable out of the general personal estate. In *In re Maddock* (3) Kekewich J. followed his previous decision. In *In re Power* (4) the question came before Byrne J., who followed the decision of Kekewich J. in preference to that of Buckley J. In *In re Dixon* (5) Buckley J. disagreed with Byrne J. In *In re Fearnside* (6) and in *In re Creed* (7) Swinfen Eady J. followed the decision of Buckley J. In *In re Dodson* (8) Warrington J. took the same view as Kekewich and Byrne JJ., and finally in *In re Orlebar* (9) Neville J. came to the opposite conclusion and

(1) [1900] 2 Ch. 648.

(5) [1902] 1 Ch. 248.

(2) [1901] 1 Ch. 691.

(6) [1903] 1 Ch. 250.

(3) [1901] 2 Ch. 372.

(7) [1905] W. N. 94.

(4) [1901] 2 Ch. 659.

(8) [1907] 1 Ch. 284.

(9) [1908] 1 Ch. 136.



followed Buckley and Swinfen Eady JJ. In the present case Parker J. has followed Kekewich, Byrne, and Warrington JJ., and I ask your Lordships, before whom the point now comes for the first time, to reverse that decision. It is said that passing to an executor *virtute officii* was a well-known expression at the date of the Act; but to say that “executor as such” is the same thing as “executor *virtute officii*” is to beg the whole question. The onus is on the respondents to shew that they mean the same thing. Property which comes to an executor *virtute officii* is property which he can recover by the mere production of the probate. Here the Legislature have deliberately used the words “as such” although the previous section speaks of an executor receiving as “executor.” The appointed fund passed to the executor as such; he was the only person who could maintain an action for the fund against the trustees of the settlement. The appointee could only have sued on his equitable title, if at all. The appointed property passed to the executor as against the beneficiaries. That is what is referred to as stoppage in transitu in *Lord Townshend v. Windham*. (1) The executor is entitled to receive the appointed fund: *In re Philbrick's Settlement* (2); *In re Hoskin's Trusts*. (3) The executor does not take as appointee. I admit that these are equitable assets, but the Act does not draw any distinction between legal and equitable assets.

*Tomlin*, for the pecuniary legatee. The appointed fund did not pass to the executor “as such” and it is primarily liable to payment of the estate duty. The expressions “*virtute officii*,” “as such,” and “as executor” mean the same thing. They are well known to refer to assets which an executor can recover by the mere production of the probate, that is to say, legal assets. They do not refer to equitable assets which he cannot recover in that way. The distinction is pointed out in *Cook v. Gregson*. (4) The object of s. 9, sub-s. 1, was to preserve the difference between legal and equitable assets, and estate duty was substituted for the old probate duty with regard to personal estate. Before the Finance Act, 1894, probate duty was payable out of the appointed

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(1) (1750) 2 Ves. Sen. 1.

(2) (1865) 34 L. J. (Ch.) 368.

(3) (1877) 6 Ch. D. 281.

(4) (1856) 3 Drew. 547.

C. A. fund itself, and there is nothing in the Act to change the incidence  
 1908 of the duty. The scheme of the Act is that the executor is made  
 HADLEY, responsible for the duty on all the personal estate which the  
*In re.* testator was competent to dispose of. That applies to property  
 JOHNSON over which he had a general power of appointment, whether he  
*v.* exercised the power or not; and an appointed fund is an equitable  
 HADLEY. asset which can only be reached in a Court of Equity.

The question is not whether the executor has received the fund, but by what title he has received it. Before the Probate Duty Act, 1860, property over which the deceased had a general power of appointment only was not subject to probate duty: *Platt v. Routh* (1), where the expression “qua executor” is used; *Drake v. Attorney-General* (2); and the effect of that Act was to make appointed funds liable to probate duty, but not to cause that to pass to the executor as such which had not previously so passed. The distinction between legal and equitable assets was maintained, and it was held that the appointed fund was equitable assets because the executor could not recover it without the assistance of a Court of Equity, and therefore that duty did not attach to it. An executor cannot obtain possession of an appointed fund by the mere production of the probate; he has to shew that the fund has been appointed, and it is because he has to prove the appointment that he does not recover *virtute officii*. The question of the incidence of estate duty is not affected by the abolition for purposes of administration of the difference between legal and equitable assets provided by Hinde Palmer’s Act, 1869 (32 & 33 Vict. c. 46), s. 1, and s. 10 of the Judicature Act, 1875. It is said in Williams on Executors and Administrators, 10th ed. vol. ii. p. 1300, that the true test whether assets are legal or equitable is not whether the executor but whether the claimant can reach them without resorting to a Court of Equity. That is to say, if the creditor can satisfy himself by suing the executor in a Court of law, the property is legal assets: Jarman on Wills, 5th ed. vol. ii. p. 1427. The result of that test also is that an appointed fund is equitable assets and does not pay duty. There is no connection between s. 8 of the

(1) (1840) 6 M. & W. 756, 791; (1841) 3 Beav. 257.

(2) (1843) 10 Cl. & F. 257.

Finance Act, 1894, and s. 9. The former deals with the executor's receipts and the latter with his title. Equitable assets have always paid their own duty, and there is nothing in the Act to change equitable into legal assets or to alter the incidence of the duty. An appointed fund was always considered to be equitable assets: *Fleming v. Buchanan* (1); *Pardo v. Bingham* (2); *Jenney v. Andrews*. (3) This seems to be doubted in *Chance on Powers*, vol. ii. p. 148, par. 1836, but he gives no authority for his view and he treats the matter as open. If the appellants' contention is upheld the result will be to eliminate the words "as such" from the sub-section.

[FARWELL L.J. The use of those words is to shew that the property is annexed to the office and not to the individual; it is a common phrase in cases on survivorship of powers.]

Counsel also referred to *Anon.* (4)

*A. F. C. C. Luxmoore*, for the annuitant in the same interest.  
*Sheldon*, for the executors and trustees.

COZENS-HARDY M.R. As at present advised we do not desire to hear any reply, but having regard to the difference of judicial opinion on the question and the importance of the case we will reserve our judgment.

Nov. 4. COZENS-HARDY M.R. This appeal raises a question upon which there has been a most remarkable difference of judicial opinion, namely, whether personal property appointed in exercise of a general power is property passing to the executor as such within the meaning of s. 9, sub-s. 1, of the Finance Act, 1894. With great respect for the four learned judges, of whom Parker J. is one, who have taken the opposite view, I agree with the three learned judges who have answered this question in the affirmative. I do not think any assistance can be gained by referring to old authorities dealing with the incidence of probate duty, nor do I think that the language used in the Finance Act ought to be construed with technical narrowness. It is in my view sufficient to say that the executor is the person, and the

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(1) (1853) 3 D. M. & G. 976.

(2) (1868) L. R. 6 Eq. 485.

(3) (1822) 6 Madd. 264.

(4) (1620) 2 Roll. Rep. 173.

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only person, who can sue for and give a receipt for the fund when appointed, and that he does so receive and so sue for it as executor by virtue of the probate: see *In re Hoskin's Trusts* (1); *Beyfus v. Lawley*. (2) The earlier sections of the Act, and particularly s. 8, sub-s. 3, seem to me to strengthen this view. The words "as such" contemplate rather a case in which a person named as executor may take property in another character, for instance as heir-at-law. The section rests upon the well-known distinction between the person and the office, and I see no reason to doubt that any property which the executor would have to account for as assets can properly be said to pass to the executor as such. The origin of the rule that property appointed under a general power is assets for the payment of the testator's debts is well stated in *Lord Townshend v. Windham*. (3) Lord Hardwicke bases it upon the view that the Court stops the fund in transitu, and says that it shall be considered as part of his estate for the benefit of creditors. We have had, however, the advantage of a very learned and able argument from Mr. Tomlin with a view of shewing that an appointed fund of this nature does not vest in the executor as such, because it must be regarded as equitable and not as legal assets. The foundation of this argument is that in case of intestacy the fund would not have been assets, and that it was only by virtue of express appointment in the will that it became assets at all. I protest against the importation into the Finance Act of the distinction between legal assets and equitable assets. But, waiving that protest, I think the argument fails. I asked for some authority in support of the proposition that the appointed fund must be regarded as equitable assets, but no authority was cited. On principle I can see no foundation for it. The question whether assets are legal or equitable does not in any way depend upon whether they have to be recovered in a Court of Law or in a Court of Equity: *Cook v. Gregson*, (4) There are, however, statements by two very learned writers which bear out the view which I had independently arrived at. Mr. Chance, in his book on Powers, vol. ii. p. 148, says: "The cases have all arisen in Equity;

(1) 6 Ch. D. 281.

(3) 2 Ves. Sen. 1, 11.

(2) [1903] A. C. 411.

(4) 3 Drew. 547.



and the doctrine is considered as peculiar to a Court of Equity, and it might be difficult for a Court of Law to interfere, at least in ordinary cases; but it may not thence follow, as a matter of course, that where the property is of such a nature as to be subject to all description of debts—as, for instance, personal estate—the fund is to be deemed equitable assets, so as for the creditors to take *pari passu*. The cases have generally occurred on personal estate; but no discussion has been found on this point. The property appointed appears, according to the authorities, to be considered as having, in a sense, become the donee's; consequently, upon principle, it might be expected that all the consequences of ownership, and no others, would follow—that the claims of creditors would attach upon the property to the same extent and in the same manner as with respect to the like description of property actually belonging to the donee." Mr. Joshua Williams, in his work on Real Assets, p. 13, deals expressly with this question: "There seems little doubt that, according to the principle of the recent decisions, personal estate appointed under a general power would now be considered as legal assets, and distributable among the creditors according to their respective priorities, rather than equitable assets distributable equally. For, although obtained only through the medium of a Court of Equity, it is distributable of right, and forms no part of the bounty of the testator. It was indeed held, after much conflict of opinion, that prior to the recent statutory alteration of the law the property was not subject to probate duty. But this was because probate was granted for that property only, which, but for the will, the Ordinary would have been entitled to administer. It vests in the executor by virtue of his office, and he has to pay the legacy duty thereon. It cannot, therefore, be any other than legal assets." I am aware that Lord Lindley in *Commissioners of Stamp Duties v. Stephen* (1) calls the appointed fund equitable assets of the testator which his executor can claim for distribution in the proper order; but I do not think he was there drawing any distinction between legal assets and equitable assets, and certainly the authorities to which he refers as establishing the rule do not

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proceed upon any such distinction. The result is that in my opinion the appointed fund became legal assets which vested in the executor as such within the meaning of s. 9, sub-s. 1, of the Finance Act. I desire to add that what I have said has no reference to real estate, which by virtue of the Land Transfer Act, 1897, a statute subsequent to the Finance Act, vests in the executor. The appeal must be allowed, and there must be a declaration that the estate duty payable in respect of the appointed fund is not a first charge on the appointed fund, but is payable by the executor out of the testator's personal estate. The costs of both parties of this appeal must be paid by the executors.

FLETCHER MOULTON L.J. I am of the same opinion. In this case the Court has to interpret the provisions of s. 9, sub-s. 1, of the Finance Act, 1894, which regulates the incidence of the estate duty created by that Act. This duty was substantially a new departure in taxation. It was created by s. 1 of the Act, and may for the purposes of this case be broadly described as a duty upon all property passing at the death of a person calculated at a rate dependent on the total amount of such property. The definition of property passing at the death of a person is a very wide one, comprising much that would not up to that date have formed any part of the estate of the person. Estate duty therefore differed essentially from probate duty, which was abolished by the same Act, and the place of which, to a certain extent, it was intended to take. It follows that the amount of estate duty payable in each case is affected by each portion of the estate, not only, as in the probate duty, by the fact that the duty has to be reckoned on such portion, but also by the fact that each portion tends to increase the total amount of the estate, and therefore to increase the rate at which the estate duty is to be levied upon every part of it. It is therefore a duty essentially connected with the totality of the estate, and the Legislature in imposing it had to decide what would be the proper incidence of this new duty, and how it could best be collected.

The mode of collection is prescribed by s. 6, sub-s. 2, which provides that the executor of the deceased shall pay the estate

duty in respect of all personal property, and may pay the estate duty in respect of other property which by virtue of testamentary dispositions of the deceased is under his control, and even of property not under his control, if requested so to do by the persons accountable for it. He is, however, protected by s. 8, sub-s. 3, from having to pay in excess of the assets which he has received as executor, or might but for his own neglect or default have so received.

The incidence of the estate duty is dealt with in s. 9, sub-s. 1. It is there provided that a rateable part of the estate duty on an estate in proportion to the value of any property which does not pass to the executor as such shall be a first charge upon the property in respect of which the duty is leviable. It follows that these portions of the estate will bear their own share of the duty, but otherwise it will, so far as personal property is concerned, be paid by the executor under s. 6, sub-s. 2, out of the general assets passing to him without his being able to make it a charge upon the specific property in respect of which it is levied.

Speaking for myself, I see no difficulty in interpreting these provisions. The description in s. 9, sub-s. 1, was intended to include real property (which would not pass to the executor as the law then stood) and other property which might pass by settlement or otherwise without going through the executor. But it does not include, and for obvious reasons was not intended to include, property that came to the executor by reason of his being such executor, of whatever nature such property might be. The presence of the words "as such" constitutes to my mind no difficulty. It was advisable to insert these words in order to make it clear that property passing to the executor in trust or otherwise by reason of a disposition in the will was not meant to be included. The treatment of property with regard to the duty was to depend on the status of the property, not on the disposition of that property under the will. Thus interpreted the section is clear, and the provisions are in accordance with the general tenor of the Act.

In the present case we have to deal with property over which the testator had a general power of appointment which was executed by the will. It is unquestioned law that such property

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passes to the executor and not to the appointee: see *In re Hoskin's Trusts* (1); *In re Philbrick's Settlement*. (2) No class of property appears to me more perfectly to satisfy the condition of "passing to the executor as such," and I find it difficult to realize that the question is one of such difficulty as to give rise to the most remarkable difference of judicial opinion that I remember ever to have met with. It has arisen, I think, from the fact that the very learned judges who have taken a different view from that which I hold have not fully realized that the Finance Act, 1894, was not an Act for settling or amending the law administered by Courts of Equity, but a fiscal Act prescribing, among other things, the incidence of a new and important duty. Had it been an Act of the former class it might have been right to look for technical and esoteric meanings to the phrases used and to expect them to correspond to special phrases used by the Courts in dealing with kindred subjects. But the presumption in a fiscal Act like the Finance Act, 1894, is that the words have their plain and ordinary meaning, and seeing that there is no difficulty in giving to them that meaning, and that the result of so doing is to make a very intelligible scheme of taxation quite in harmony with the rest of the Act, I can have no doubt that it is the duty of the Court so to interpret them. It is inconceivable to my mind that in the year 1894 the Legislature intended to make the incidence of the estate duty on personal property depend on the recondite and intricate distinctions which the Courts used to make between legal and equitable assets, distinctions which took their rise from that severance of legal and equitable jurisdiction in the Courts which the Legislature had for twenty years previously sought to put an end to, and which distinctions have no basis in the nature of the assets themselves which would give any claim to different treatment in the matter of the incidence of estate duty.

I am therefore of opinion that the estate duty on the property in this case must be paid by the executor in the same way as the duty upon the other personal property of the testator coming to him as executor.

I wish to add that, for the reasons given in the judgment of

(1) 6 Ch. D. 281.

(2) 34 L. J. (Ch.) 368.

the Master of the Rolls, I am also of opinion that the property in this case is legal and not equitable assets, but I desire to found my judgment on the ground that legal and equitable assets are alike assets passing to the executor as such within the meaning of s. 9, sub-s. 1.

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FARWELL L.J. The execution by a testator of a general power of appointment makes the appointed fund assets for the payment of his debts; his execution of the power is necessary in order to get rid of the rights of the persons entitled in default of appointment, but, when once made, operates as the acquisition of the fund by himself for the purpose of paying his debts in due course of administration, and then for the appointees, or, if they predecease him, for his own residuary legatees, or by way of resulting trust to the persons entitled in default of appointment, according to the true construction of his will: see *In re Van Hagan*. (1) It is, however, quite clear that he makes the property his own assets in the first instance, and that the appointees take from his bounty, and not from that of the creator of the power, as is the case with limited powers. His executor is entitled to receive the appointed fund, and can give a valid discharge for it, without proving the existence of any debts, and although the fund is largely in excess of all the testator's debts; and if he misapplies the fund, he, and not the trustees who paid it over to him, is liable: *In re Hoskin's Trusts* (2); *Hayes v. Oatley*. (3) Notwithstanding a phrase in Sir John Leach's judgment in *Jenney v. Andrews* (4), it is clear that the executor is no more a trustee for the creditors of the appointed fund than he is of the rest of the testator's personal estate; his liability to them is that of executor, not of trustee, and the fund becomes part of the testator's estate on his death, although the Courts have determined that it shall not be applied in payment of his debts until the assets that were his property in his life-time have been exhausted. The phrase in Turner L.J.'s judgment in *Fleming v. Buchanan* (5) is a little obscure, but he is evidently

(1) (1880) 16 Ch. D. 18.

(3) (1872) L. R. 14 Eq. 1.

(2) 6 Ch. D. 281, 283.

(4) 6 Madd. 264.

(5) 3 D. M. & G. 976.



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dealing first with the distinction between property and power, which is well settled, and then with the result of the appointment, and does not intend to say that an appointed fund does not become by the appointment part of the testator's assets.

It has been argued before us that the executor really takes as an appointee under the power, because its execution is necessary to his title; but, although the execution is necessary as evidence of the volition of the testator to take the property from the persons entitled in default of appointment, the executor takes not under, but, so far as creditors are concerned, in defeasance of, the appointment. As Lord Hardwicke said in *Lord Townshend v. Windham* (1), "In respect of his creditors it must be considered as part of his estate at the time of his death, he having executed it so as to gain the interest to himself." And one hundred and fifty-three years afterwards Lord Lindley, in *Beyfus v. Lawley* (2), says this: "It cannot now be denied that property appointed by will under a general power is assets for payment of the debts of the appointor, and is not regarded as property of the donor of the power distributable by the donee thereof. The property appointed is in such a case treated as assets of the testator exercising the power, and the assets so appointed are regarded as property bequeathed by him."

It is then said that the executor takes the fund as equitable, not as legal, assets, but in my opinion the funds are legal assets for the reasons and on the authorities already mentioned by the Master of the Rolls. I would only add that Lord Lindley's words in the case in the Privy Council referred to by the Master of the Rolls were not in any way necessary for the decision of the case before the Board.

This disposes of the case; but I wish to add that s. 9 of the Finance Act cannot, in my opinion, be read as if the words "as legal assets" were substituted for "as such." The plain meaning of "as such" to my mind is "in the character of executor as distinguished from his personal capacity or as trustee." The words are required to meet such a case as that of the executor being heir-at-law or devisee in trust or beneficially. I can find no foundation for the argument that estate duty was intended

(1) 2 Ves. Sen. 1, 11.

(2) [1903] A. C. 411, 413.



to take the place of probate duty, so as to make decisions in probate duty cases applicable to estate duty. The Finance Act of 1894 was a new departure, and the older modes of taxation were swept away in order to give place to more stringent and far-reaching demands on the subject. Unless compelled by plain words, I could not persuade myself that the Legislature intended to apply to the incidence of the new duties in 1894 a cumbersome system which had been for most practical purposes abolished in 1869. The Treasury had nothing to gain by its revival; and there is no question of justice between legatees, for all alike take from a testator's bounty, whether the channel through which that bounty flows be property or general power.

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Solicitors: *Burton, Yeates & Hart, for Johnson & Co., Birmingham; Hadley & Dain; Sharpe, Pritchard & Co., for Porter, Amphlett & Jones, Conway.*

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[1907 B. 4648.]

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*Mines—Overlying and underlying Seams of Coal—Powers of Working—Subsidence—Right to Support—Evidence—Necessary Implication.*

In construing instruments which involve the severance of surface or of a higher seam and subjacent minerals, it is presumed that the owner of the surface or of the higher seam intends to reserve his common law right of support; the onus of shewing that this was not the intention of the parties to the deed lies on the mineral owner, and this onus is not discharged by the insertion of full powers of working and carrying away all the minerals expressed in general terms, or of wide provisions for compensation. But when the mineral owner proves not only that the upper seam will not be destroyed, but only injured to such an extent as will admit of compensation, and, further, that it is impossible to get the minerals at all without letting down the upper seam, all reasons for qualifying the general words of the powers of working are gone, and if the terms of the instruments make it clear that it was the intention of the parties that subjacent seams should be worked, it is a necessary implication

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 1908 *Butterknowle Colliery Co. v. Bishop Auckland Industrial Co-operative Co.*, [1906] A. C. 305, distinguished.  
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APPEAL from a decision of Neville J. (1) which raised the question whether, on the construction of certain mining leases of an upper and a lower seam of coal, the lessees of the upper seam had by necessary implication lost their common law right to support.

By an indenture of lease dated January 25, 1887, the Duke of Portland, as tenant for life under a settlement and under the powers of the Settled Land Acts, demised to the plaintiffs a seam of coal known as the Top Hard Seam, lying under some 6700 acres of freehold and copyhold lands, "all which said freehold and copyhold lands are situate in one or other of the parishes of Kirkby-in-Ashfield, Annesley, Fullwood, and Sutton-in-Ashfield in the county of Notts and are down to and including the Top Hard Seam aforesaid hereinafter referred to as the 'mining area' or, 'the area,' " with usual powers of working, winning, and carrying away the coal, for the term of sixty years from March 25, 1885, at the rents and royalties therein mentioned. And it was thereby agreed and declared that the beneficial reversioner or reversioners would not let the mines underlying the Top Hard Seam to any person or persons other than the plaintiffs or their assigns without first offering a lease of them to the plaintiffs or their assigns, and, if they should fail to accept such lease in writing within six calendar months after such offer, would not let the said underlying mines at lower rents or royalties to any person or persons other than the plaintiffs or their assigns without first offering a lease of them to the plaintiffs or their assigns at such reduced rents or royalties. . . . " In case the said beneficial reversioner or reversioners shall consistently with the provision lastly hereinbefore contained have let the underlying mines to any person or persons other than " the plaintiffs or their assigns, " it shall be lawful for the said reversioner or reversioners and his or their tenants of such underlying

mines (subject as to the said copyhold lands to the copyhold estates affecting the same respectively) to enter upon any part or parts of the mining area aforesaid and to sink to, work, get and carry away all or any of the said underlying mines, and for the purposes aforesaid or any of them to sink, make, erect and use all such pits buildings engines machinery roads works and conveniences upon through or under all or any of the same lands and over under or across all or any of the roads ways levels and workings of the lessees or their executors administrators or assigns as shall be necessary or expedient so that such roads ways levels and workings be not unnecessarily injured thereby, and in such cases the said lessees their executors administrators or assigns shall leave such pillars or ribs of coal and other minerals as the said beneficial reversioner or reversioners or his or their mining agent shall require on account of the shafts buildings and works necessary or proper for working such underlying mines, for which pillars and ribs of coal and other minerals so left no royalty, rent or sum of money shall be paid. Also in such cases the beneficial reversioner or reversioners shall indemnify the said lessees their executors administrators or assigns against any physical damage that may be caused by the operations of the said tenants of the said underlying mines to the mines or mining apparatus of the said lessees their executors administrators or assigns." The lease contained a covenant by the plaintiffs to leave a barrier of coal sixty yards thick between the Top Hard Seam demised to them and any adjoining seam belonging for any estate of interest to or authorized to be worked by them.

By another lease dated February 11, 1892, the Ecclesiastical Commissioners for England demised to the plaintiffs (thereinafter referred to as "the company") the Top Hard Seam lying under some 200 acres of glebe land in the parish of Kirkby-in-Ashfield aforesaid (thereinafter referred to as "the said lands") with full powers (subject and except as thereinafter excepted) of working, winning, and carrying away the coal for the term of sixty years from March 25, 1891, at the rents and royalties therein mentioned. This lease contained an exception and reservation of full power and authority for the lessors and their

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lessees during the term thereby granted to win, work, and carry away all minerals under the said lands other than the seam of coal thereby demised, and for that purpose to sink, drive, and use all such pits, shafts, &c., and other works through, across, over, along, and under the seam of coal thereby demised, and through, across, over, and under any levels or workings of the plaintiffs as should be necessary or convenient, "Provided always that neither the lessors nor the persons or person exercising the liberties, powers and authorities hereby reserved or any of them shall be liable to the company their successors and assigns for any damage or injury that may be caused to the premises hereby demised or any part thereof or to the drifts levels adits water-courses rail and road engines machinery and works constructed by or belonging to the said company their successors or assigns by reason of the due and proper exercise of the liberties, powers and authorities hereby reserved or for any loss arising to the said company consequent upon such damage injury and interruption as aforesaid."

The Top Hard Seam was the nearest seam to the surface, and under their said leases the plaintiffs went into possession of it and worked it continuously from two collieries known as the Portland Colliery and the Kirkby Colliery. The uppermost workable seam underlying the Top Hard Seam, and lying about 170 yards below it, was the Deep Soft Seam. In 1892 the Duke offered a lease of the Deep Soft Seam under the same area to the plaintiffs, who declined it, and subsequently, in August, 1893, he granted a lease of it to the defendants, who also obtained a lease of the same seam from the Ecclesiastical Commissioners so far as it underlay the 200 acres of glebe land. These leases contained usual powers for working and carrying away the Deep Soft Seam. The defendants worked the Deep Soft Seam continuously, and for some years prior to March, 1907, the plaintiffs from time to time sent in to the Duke claims for damage caused in their mine by the workings of the defendants. The Duke paid the amount of the claims and was repaid by the defendants. In 1907 the plaintiffs experienced much greater difficulty in working the Top Hard Seam, the damage in their workings increased, and some subsidence was caused. Thereupon they



commenced this action, alleging, amongst other things, that the plaintiffs' leases did not reserve powers to the lessors to withdraw support from the Top Hard Seam, and that they were entitled to have the Top Hard Seam supported by the seam in lease to the defendants, and they claimed an injunction to restrain the defendants from further working the Deep Soft Seam in such a manner as to cause the Top Hard Seam, or the plaintiffs' works and buildings connected therewith, to crack or subside, or from otherwise injuring the same.

The various allegations in the statement of claim and in the defence are more fully stated in the report of the case in the Court below, but for the purposes of this report, and in the view taken of the case by the Court of Appeal, it is not necessary to repeat them.

The defendants had still some 1500 acres of unworked Deep Soft Seam underlying unworked Top Hard Seam in lease to the plaintiffs, and it appeared from the evidence that the defendants worked the Deep Soft Seam on the long wall system, the recognized method in the district; that their workings were carried on in a reasonable and proper manner; and that at the time when the leases were granted it was common knowledge to all persons conversant with mining that it would be impossible to work the lower seam at all without causing damage by subsidence to the upper seam. The result of this evidence is more fully referred to in the judgments.

The main question for consideration in the Court below and on appeal was whether upon the construction of the leases to the plaintiffs it could be said that the lessors had expressly or by necessary implication reserved the right to remove the underlying support of the mine which had been demised to the plaintiffs. Neville J., considering himself bound by the principle laid down in *Butterknowle Colliery Co. v. Bishop Auckland Industrial Co-operative Co.* (1), held, upon the construction of the documents, that the right of removing support from the property demised to the plaintiffs was not reserved to the lessors, either expressly or by necessary implication, and consequently that the defendants in doing what they had done had been guilty of trespassing against

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(1) [1906] A. C. 305.



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the property of the plaintiffs, and therefore that the plaintiffs were entitled to be protected by an injunction. His Lordship also ordered an inquiry as to damages, allowance being made for the payments already received by the plaintiffs; and the defendants were also directed to pay the costs of the action.

The defendants appealed.

*Sir R. Finlay, K.C., Astbury, K.C., and H. T. Waddy, for the appellants.* The main question is whether upon the construction of the Duke of Portland's lease the lessor reserved the right to work by himself or his tenants the underlying seams of coal, even though it might cause the upper seam, which was let to the plaintiffs, to subside. Neville J. decided against his own judgment in deference to the authority of the decision of the House of Lords in *Butterknowle Colliery Co. v. Bishop Auckland Industrial Co-operative Co.* (1), but that decision contained nothing to force him to decide contrary to the natural construction of the language of the lease. The Lord Chancellor lays down, as the result of the authorities, (1.) that when the surface and the minerals are owned by different persons, *prima facie* the right to work the minerals does not deprive the surface owner of the right to support; (2.) that the existence of a compensation clause does not imply a right to let down the surface, if the clause can be satisfied by reference to acts done on the surface as distinguished from the withdrawal of support. He recognizes, however, that the right to let down the surface may be conferred either by express words or by necessary implication, which must mean necessary implication as applied to the facts of the case, and he does not attempt to lay down any artificial rule of construction applicable to all cases. That case is distinguishable from the present on several grounds. First, that was a case of letting down the surface, which *prima facie* destroys it for the purpose for which it is granted, whereas this is a case of letting down an intervening stratum of minerals, which merely causes subsidence and is not inconsistent with the full enjoyment of that stratum, but at the most increases the expense of getting the minerals; and although the principle governing the right of support may

(1) [1906] A. C. 305.

be the same in the two cases, the application of that principle is different, for the evidence shews that it is practically impossible to work a lower seam without letting down the seam above, and if this principle were to be applied to intervening strata, all lower seams would be struck with sterility. Secondly, it was contemplated by the parties that subsidence would occur, and therefore the lease gave to the lessees the option to take the lower seam in order to give them a right of support, and provided, in the event of their not exercising the option, that compensation should be paid for damage caused by the working of the underlying strata. The evidence is clear that to the knowledge of the parties it was impossible to work the lower seam without letting down the upper seam, and, therefore, the reservation of the right to work the lower seam necessarily involved the right to withdraw the support from the seam above, for when anything is granted that also is granted which is necessary to carry out what is granted. Thirdly, the compensation clause implies the existence of such a right, for, relating as it does to damage done, not to the upper surface, but to an intervening stratum, it can only refer to damage occasioned by subsidence, since no other damage was possible. The only case which relates not to the upper surface but to an intervening stratum is *Mundy v. Duke of Rutland* (1), which is distinguishable from the present case because there the evidence shewed that the working of the lower seam would absolutely destroy the subject of the demise; but the general observations of Kay J., which were in no way affected by the decision of the Court of Appeal in that case, support the appellants' contention.

[On the main question they also referred to *Davis v. Treharne* (2); *Taylor v. Shafto* (3); *Shafto v. Johnson* (4); *Roberts v. Haines* (5); *Love v. Bell* (6); *Bell v. Earl of Dudley* (7); *New Sharlston Collieries Co. v. Earl of Westmorland* (8); *Chamber Colliery Co. v. Twyerould* (9); *Aspden v. Seddon*. (10) On the

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(1) (1883) 23 Ch. D. 81.

E. &amp; B. 625.

(2) (1881) 6 App. Cas. 460.

(6) (1884) 9 App. Cas. 286.

(3) (1867) 8 B. &amp; S. 228.

(7) [1895] 1 Ch. 182.

(4) (1863) 8 B. &amp; S. 252, n.

(8) [1904] 2 Ch. 443, n.

(5) (1856) 6 E. &amp; B. 643; (1857) 7

(9) H. L., July 20, 1893.

(10) (1875) L. R. 10 Ch. 394.

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question whether the remedy should be by injunction or damages (as to which counsel for the respondents were not called upon) they cited *Colls v. Home and Colonial Stores, Ltd.* (1); *Shelfer v. City of London Electric Lighting Co.* (2); *Wood v. Sutcliffe.* (3)]  
[FARWELL L.J. referred to *Goodson v. Richardson.* (4)]

*C. A. Russell, K.C.*, and *MacSwinney*, for the respondents. Apart from the terms of the particular bargain, which must always be a question of construction, there is no difference between the support of the surface and the support of an intervening stratum. The two things are exactly in *pari materia*, and the cases as to support of the surface apply. The *Butterknowle Case* (5) lays down rules which are to be borne in mind in dealing with any instrument by which a severance is created between different strata of the freehold. The question is whether you can find in express terms or by necessary implication from the provisions of the document itself that there is an intention to give up the right of support. It is for the person seeking to take away the common law right of support to shew that the words of the document have that effect. The presumption in this case is not rebutted by anything to be found in the lease. There is nothing in the language of the lease which leads to the inference that the lessees of the underlying seam were to be allowed so to work as to withdraw support from the overlying seam.

The necessary implication must be derived from inside the four corners of the document to be construed: *Shore v. Wilson* (6); *Smith v. Darby.* (7)

[FARWELL L.J. You are always at liberty to put yourself in the position of the parties as regards knowledge of the subject-matter: *River Wear Commissioners v. Adamson.* (8) Here the knowledge of the parties was that the lower seam could not be worked without letting down the upper one.]

*Hext v. Gill* (9) displaces the proposition that you get the necessary implication from the fact that the property cannot be enjoyed without letting down the surface.

(1) [1904] A. C. 179.

(2) [1895] 1 Ch. 287.

(3) (1851) 2 Sim. (N.S.) 163.

(4) (1874) L. R. 9 Ch. 221.

(5) [1906] A. C. 305.

(6) (1842) 9 Cl. & F. 355, 525.

(7) (1872) L. R. 7 Q. B. 716.

(8) (1877) 2 App. Cas. 743, 763.

(9) (1872) L. R. 7 Ch. 699.

[FARWELL L.J. That was a case of total destruction of the surface. The exact point is put by Lord Wensleydale in *Rowbotham v. Wilson*. (1)]

[They also referred to and discussed *Harris v. Ryding* (2); *Aspden v. Seddon* (3); *Davis v. Treharne* (4); *Taylor v. Shafto* (5); *Bell v. Love* (6); *Markham v. Paget*. (7)]

Here there are two competing rights, the right of the surface owner and the right of the mineral owner, and the Court has to decide which of these is to prevail, and this must depend upon the language of the leases; and apart from express provisions to the contrary the right of the mineral owner must give way to the right of the surface owner. There is nothing in these documents which takes away or derogates from the common law right of the owner of the surface to insist that the owner of the minerals shall have sufficient support, and the provisions as to payment of compensation relate only to compensation for damage done by accident or negligence: *Buchanan v. Andrew* (8); *Dixon v. White*. (9)

There is no reason why the principles that apply in favour of surface owners should not also apply to overlying and underlying seams; if the owner of minerals reserves them, it is his duty to have sufficient support for the surface: *Humphries v. Brogden*. (10) The question of overlying and underlying seams was raised in *Mundy v. Duke of Rutland* (11), which supports the contention that the upper seam is entitled to sufficient support, unless the right to let down is reserved in plain and clear language. The compensation clause does not contemplate subsidence; it is limited in time and limited to physical damage.

[The respondents' counsel were not called upon on the second question, the remedy by injunction.]

*Sir R. Finlay, K.C.*, in reply. The rules laid down by the authorities must be applied, taking into account all the circumstances of the case, the nature of the transactions, and the real

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(1) (1860) 8 H. L. C. 348, 360.

(2) (1839) 5 M. &amp; W. 60.

(3) L. R. 10 Ch. 394.

(4) 6 App. Cas. 460.

(5) 8 B. &amp; S. 228.

(6) (1883) 10 Q. B. D. 547.

(7) [1908] 1 Ch. 697.

(8) (1873) L. R. 2 H. L. Sc. 286.

(9) (1883) 8 App. Cas. 833.

(10) (1850) 12 Q. B. 739.

(11) 23 Ch. D. 81.



C. A.      object of the parties as evidenced by the subject-matter of the  
 1908      lease: *Staples v. Young*. (1) The evidence here must be fully  
 ~~~~~ considered.

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Nov. 6. COZENS-HARDY M.R. This appeal raises the important question whether the defendants are entitled to work a lower seam of coal, the working of which will necessarily occasion damage by subsidence to the plaintiffs, who are lessees of an upper seam. Now it has been laid down again and again in the House of Lords, and nowhere more clearly than in *Butterknowle Colliery Co. v. Bishop Auckland Industrial Co-operative Co.* (2), that there is a presumption, in construing a document by which mines are severed from the surface, that a right to let down the surface by mining operations must be presumed not to exist unless there are clauses in the instrument which expressly, or by necessary implication or intendment, are inconsistent with the presumption of support. Evidence is admissible to explain the circumstances under which an instrument was executed, including facts known to both parties. The meaning of words varies according to the circumstances. There is another presumption which must not be overlooked, and which is expressed in the well-known maxim, “Quando aliquid conceditur, conceditur etiam et id sine quo res ipsa non esse potuit.” This is only another way of asserting the proposition, which I believe to be good law and good sense, that an instrument ought not to be construed in such a way as to render it, to the knowledge of both parties, wholly inoperative. The maxim “Ut res magis valeat” may be legitimately applied in construing the instrument. I cannot accept the argument that the duty of the Court is to construe the instrument without reference to any evidence, and I find nothing in any of the cases in the House of Lords to support the argument. In every case which has been brought to our notice by counsel it was either (1.) proved, or (2.) admitted, or (3.) assumed that the subjacent mines could be worked in such a way as not to produce subsidence of the surface, and in that state of facts it was held that the first presumption to which

(1) [1908] 1 I. R. 135, 143.

(2) [1906] A. C. 305.

I have referred must prevail, and that provisions framed in very wide language ought to be so construed as to apply only to such mining operations as would not cause subsidence. In no case has the presumption been so applied as to render the lease or grant or reservation of the subjacent mines an idle form. The injunction granted has been to restrain the defendants from working the mines so as to let down the surface—a form which presupposes the possibility of working the mines without letting down the surface.

The plaintiffs are lessees under five leases, beginning in 1887, for different terms of years, of the Top Hard Seam of coal, which is 180 yards below the surface. There is another seam known as the Deep Soft Seam, which is 170 yards below the Top Hard Seam. The upper seam has been considerably worked, but the lower seam, of which the defendants are lessees, has not been so extensively worked, although the defendants are now actively engaged in mining it. The evidence is clear and uncontradicted that at the times when the leases to the plaintiffs were granted it was common knowledge to all persons conversant with mining that it would be impossible to work the lower seam at all without causing damage by subsidence to the upper seam. [His Lordship read certain extracts from the evidence, and continued :—] There was no attempt to qualify this evidence, and the learned judge was not only justified in finding, but bound to find, that according to the knowledge of the present day (by which, I take it, he intended to mean the dates of the leases) the extraction of the mines underlying the upper strata does, as a matter of practical business, necessarily lead to their subsidence. The case has been argued before us on that assumption. Neville J., contrary to his own view and in deference to the supposed rulings of the House of Lords in *Butterknowle Colliery Co. v. Bishop Auckland Industrial Co-operative Co.* (1), granted an injunction, the effect of which must be that the lower seam cannot be worked at all during the continuance of the leases of the upper seam. Now in every one of the leases granted to the plaintiffs are to be found provisions which shew that the working of the lower seam during the currency of the lease was contemplated

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by both parties, and in many of the leases obligations are imposed on the plaintiffs to assist or not to obstruct the mining operations which ex hypothesi it was known must produce subsidence. I do not think it necessary to direct attention to the precise terms of the various leases. I prefer to rest my judgment on the broad principle that there is a necessary implication that the known and inevitable results of the contemplated and authorized working of the lower seam cannot be complained of by the plaintiffs except so far as they may be entitled to compensation from their lessors under covenants in their leases. I assume, in favour of the plaintiffs, that the principles which apply as between a surface owner and the owner of a mineral seam apply also between the owner of an upper seam and the owner of a lower seam, but I may observe that the damage by subsidence is far less in the latter case.

The result is that in my opinion this appeal must be allowed with costs and the action be dismissed with costs.

FLETCHER MOULTON L.J. I am of the same opinion. The law with regard to the right of support in cases where the property in the minerals has been severed from the property in the surface appears to me to be well settled. The latest and most complete enunciation is to be found in the case of *Butterknowle Colliery Co. v. Bishop Auckland Industrial Co-operative Co.* (1), in the House of Lords, and I shall take as an authoritative statement of that law the following passage from the judgment of the present Lord Chancellor in that case (2): "Whenever the minerals belong to one person and the surface to another, the law presumes that the surface owner has a right to support, unless the language of the instrument regulating their rights, or other evidence, clearly shews the contrary. In order to exclude a right of support, the language used must unequivocally convey that intention, either by express words or by necessary implication. For the same presumption in favour of a right of support which regulates the rights of parties, in the absence of an instrument defining them, will apply also in construing the instrument when it is produced. If the introduction of a clause

(1) [1906] A. C. 305.

(2) [1906] A. C. 309.

to the effect that the mines must be worked so as not to let down the surface would not create an inconsistency with the actual clauses of the instrument, then it means that the surface cannot be let down."

We have now to apply the law thus enunciated to the circumstances of the present case. It differs from preceding cases in that for the first time the Court is by proper evidence made cognizant of a fact which has been known for many years to those conversant with coal-mining, namely, that except in the case of shallow seams the working of the coal in a seam is inevitably followed by a corresponding sinking of the whole of the superjacent strata and, consequently, of the surface. The enormous pressure of the superincumbent strata in the case of such seams forces down the roof of the excavation until it reaches the floor, so that the whole of the excavation is solidly filled up. The subsidence thus started is passed on throughout the whole of the overlying strata, becoming in its progress more evenly distributed over the area affected until it reaches the surface. So constant and invariable is this effect that a numerical connection is recognized as existing between the total amount of excavation and the resulting subsidence, the latter amounting to 60 per cent. of the former. Thus, if the amount excavated beneath the area is equivalent to a layer five feet deep, the surface will inevitably sink three feet, and it is immaterial whether the excavation has been uniform over the area (as when the long wall system of working is practised) or whether (as in the case of pillar and stall) it has been irregular. Circumstances such as these may influence the evenness of its subsidence, but not its amount, which depends only on the total quantity excavated, and which will be three-fifths of that total excavation, however it may be distributed. In other words, excavation necessarily implies a subsidence of at least three-fifths of its amount.

There is no contest in the present case as to the truth of the above law or as to its being well known at all times material to the present case. Not only is there the clearest direct evidence of this on the part of the plaintiffs' own witnesses, but their counsel have admitted it and the case has been argued before us on that basis. It follows, therefore, that if the instruments make

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it clear that it was the intention of the parties that subjacent seams should be worked, it is a necessary implication that they intended that there should be subsidence of the superjacent strata.

The present case differs also from most of those which have been before the Courts in that the support claimed is support to an underground stratum and not to the surface of the land. I do not propose to discuss whether the law that is applicable to the support of the surface of the ground is applicable without modification to the support of such an underground stratum when it forms the subject of a mining lease. It is sufficient to point out that the subsidence of the surface which necessarily follows the excavation of an underlying seam is equally inevitable in the case of all the strata lying between that seam and the surface, and the subsidence of the surface is merely the external manifestation of that which is taking place throughout the whole of the strata between the surface and the seam that is being worked. The same necessary implication, therefore, exists in the case of an underground stratum as exists in the case of the surface.

At the same time there is to my mind a wide difference between the importance of support in the two cases. So dependent is the use of the surface upon the enjoyment of support that judges have sometimes spoken of its withdrawal as well nigh amounting to a destruction of the property in the surface. The same cannot be said of support to a seam of coal. Any one acquainted with coal mines must know that it is an ordinary mining incident to work coal which has been or is being allowed to sink by reason of lower workings. In cases where more than one seam belongs to a colliery it is common practice to work a lower seam before an upper one or to work two seams at different depths simultaneously, although the workings of the one more or less underlie the workings of the other. The ground subsides as a whole, carrying down the upper seams together with their containing strata, and the only effect is usually a slight increase of cost or trouble in working. So far as the question of the consequences of working the coal in a subjacent seam is concerned the facts in the present case afford an example of this.

Bearing in mind, therefore, that the working of the lower

seams in this case involves by necessary implication the subsidence of the upper seam, we must examine the leases under which the plaintiffs hold their mining rights to see whether those leases contemplate and permit such working. It is not necessary to go through them in detail, for it is beyond question that each one of them specifically leaves the lessors free to work or permit the working of the lower seams, and, therefore, by necessary implication to cause the corresponding subsidence in the upper seam. This conclusion is perhaps most clearly arrived at by applying the test suggested by the Lord Chancellor in the passage which I have quoted from his opinion in *Butterknowle Colliery Co. v. Bishop Auckland Industrial Co-operative Co.* (1) Imagine a clause introduced into any one of these instruments to the effect that the lower seams must be worked so as not to let down the upper seam. By reason of the admitted law of inevitable subsidence that would amount to saying that they must not be worked at all, and this would plainly be inconsistent with the clauses that permit them to be worked. We must therefore read the clauses permitting the working of the lower seam with their necessary implication, namely, that such working will cause the corresponding subsidence in the upper seam, and hold that when the parties agreed that the former should be permitted they also intended to permit the latter as being its inevitable consequence.

For these reasons I am of opinion that this appeal must be allowed.

FARWELL L.J. The answer to the question on this appeal depends on the true construction of the five leases under which the plaintiffs hold, and which are the documents of severance of the upper seam claimed by them from the lower seams. It is now well settled that the owner of the surface, or of a higher seam, does not lose his common law right to support unless the document of severance takes it away, either by express words or by necessary implication; and by necessary implication I understand that which the Courts infer from relevant admissible evidence for the purpose of giving to the transaction such efficacy

(1) [1906] A. C. 305.

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as must have been intended by business men entering into such a transaction as explained in *The Moorcock*. (1) It is also well settled that in construing a document—I quote Lord Blackburn in *River Wear Commissioners v. Adamson* (2)—“In all cases the object is to see what is the intention expressed by the words used. But, from the imperfection of language, it is impossible to know what that intention is without inquiring farther, and seeing what the circumstances were with reference to which the words were used, and what was the object, appearing from those circumstances, which the person using them had in view; for the meaning of words varies according to the circumstances with respect to which they were used.” Then, on the next page, after referring to wills, he goes on: “In the case of a contract, the two parties are speaking of certain things only, and therefore the admissible evidence is limited to those circumstances of and concerning which they used those words: see *Graves v. Legg*. (3) In neither case does the Court make a will or a contract such as it thinks the testator or the parties wished to make, but declares what the intention, indicated by the words used under such circumstances, really is.” One of the earliest illustrations of this is the maxim “Quando aliquid conceditur, conceditur etiam et id sine quo res ipsa non esse potuit,” for evidence is necessary to shew the nature of the subject-matter of the grant, and the impossibility of its enjoyment without the advantage claimed as granted by necessary implication, in order that the question can be raised at all. And this is stated by Lord Wensleydale in *Rowbotham v. Wilson* (4), in a passage quoted with approval by Lord Chelmsford (5) and by Blackburn J. (6) “The rights of the grantee to the minerals,” says Lord Wensleydale, “by whomsoever granted, must depend upon the terms of the deed by which they are conveyed or reserved when the surface is conveyed. Prima facie, it must be presumed that the minerals are to be enjoyed, and, therefore, that a power to get them must also be granted or reserved, as a necessary incident. It is one of the

(1) (1889) 14 P. D. 64, 69.

(2) 2 App. Cas. 743, 763.

(3) (1854) 9 Ex. 709.

(4) 8 H. L. C. 360.

(5) *Ramsey v. Blair*, (1876) 1 App. Cas. 703.

(6) L. R. 7 Q. B. 722.

cases put by Sheppard (Touchstone, ch. 5, p. 89) in illustration of the maxim, 'Quando aliquid conceditur, conceditur etiam et id sine quo res ipsa non esse potuit,' that, by grant of mines is granted the power to dig them. A similar presumption, *prima facie*, arises, that the owner of the mines is not to injure the owner of the soil above by getting them, if it can be avoided." The learned lord obviously means by the words "if it can be avoided" that the surface may be let down if the mines cannot be worked at all without so letting it down. The Courts refuse to suppose that men execute deeds or documents apparently for business purposes and good consideration with the intention that such deeds or documents shall have no effect; and if it is once shewn that the surrounding circumstances at the date of execution were such that both parties must have known, or if it is proved or admitted that both parties knew at the date of the execution, that their deed could have no effect unless some further provision not expressed in the deed can be read into it, then such further provision is read in by necessary implication. It is clear on the construction of all the leases in question that the parties intended that the lessor, or persons claiming under him, should work the lower seams and get and carry away the coal therefrom; and the evidence in the present case is also clear, and the judge below has found, that it is impossible to work the lower seam at all, either by long wall or by pillar and stall or otherwise, without letting down the upper seam, and that this was known to both parties at the date of the lease. It is further clear that such letting down does not absolutely destroy the upper seam, but merely renders it more expensive to work. In none of the reported cases has evidence been adduced to shew the impossibility of working at all without letting down the surface. I doubt if the effect of deep workings, such as in the present case, had been accurately ascertained (as it is now) when the Inclosure Acts of the eighteenth century were passed, or even in the middle of last century; at any rate no evidence was adduced in any one of those cases to shew that the parties knew the fact at the date of the instrument of severance. These two facts, namely, the impossibility to the knowledge of both parties of getting the lower seam without letting down the

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upper seam, and the possibility of letting down the upper seam without totally destroying it, differentiate the present case from *Butterknowle Colliery Co. v. Bishop Auckland Industrial Co-operative Co.* (1) and all cases of that class. Most of those cases (and they are numerous) were cited to us, and the result of them all is this. In construing instruments of severance of surface (I use "surface" as including an upper seam) and its subjacent minerals, it is presumed that the surface owner intends to reserve his common law right of support; the onus of shewing that this was not the intention of the parties to the deed lies on the mineral owners, and such onus is not discharged by the insertion of powers of working, getting, and carrying away all the minerals expressed in general terms, or from wide provisions for compensation. The Courts have restricted the generality of such powers in such cases by reading in the qualification "so far as is possible without letting down the surface," and they have done so on the assumption that it is impossible to impute to business men entering into such a contract an intention by which the surface which is reserved can be destroyed, when effect can be given to the rights of both parties by qualifying the wide words of the power of getting the minerals; such qualification is, in fact, the result of necessary implication. But it is quite a different matter when (as here) the mineral owner proves not only that the upper seam will not be destroyed, but only injured to such an extent as easily to admit of compensation, but further that it is impossible to get the minerals at all without letting down the upper seam. All reasons for qualifying the general words of the power are gone, and, instead thereof, excellent reasons appear for implying (if necessary) the words "even although the upper seam is let down or injured." The Courts do not readily adopt a construction of a deed which will nullify all the rights given under it to one of the parties thereto, and it cannot read into these leases, which contain elaborate powers and rights enabling the mineral owners to work, a proviso that such powers are not to be exercised at all, and yet that is what the respondents ask us to do. It is not a case of qualified working, it is a case of not working at all, and

(1) [1906] A. C. 305.

so to read the deeds would be to stultify the parties. I rest my judgment on this broad ground, which renders it unnecessary to examine the leases in detail; but I should not be prepared to hold that some of the leases do not contain provisions sufficiently express to distinguish this case from the *Butterknowle Case* (1), if it applied. I am therefore of opinion that this appeal should be allowed and the action dismissed with costs here and below.

Solicitors: *Thicknesse & Hull; J. P. Garrett, for Watson, Esam & Barber, Sheffield.*

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An owner of leasehold property entered into a contract under the Lands Clauses Consolidation Act, 1845, to sell the same to the London County Council, and died after the title was accepted but before the sale was completed, having bequeathed all his property to his wife and appointed her sole executrix:—

Held, that the costs of taking out probate to the vendor's will were not payable by the purchasers under s. 82 of the Act.

Decision of *Joyce J.*, [1908] 2 Ch. 503, affirmed.

APPEAL from a decision of *Joyce J.* (2) which raised the question whether the costs of obtaining probate of the vendor's will were costs payable by a statutory purchaser under s. 82 of the Lands Clauses Consolidation Act, 1845.

On November 25, 1903, notice to treat was served by the School Board for London on Joseph Baxter for his estate and interest in certain leasehold premises. After some negotiation, an offer of 1050*l.* was made for the property by the London County Council, in whom the rights and liabilities of the School Board for London had then become vested.

On November 29, 1905, this offer was accepted by Baxter.

An abstract of title was delivered, requisitions were made and

(1) [1906] A. C. 305.

(2) [1908] 2 Ch. 503.

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answered, the title was accepted, and a draft assignment submitted before Baxter's death on February 27, 1906.

By his will Baxter gave all his estate and effects to his wife absolutely and appointed her sole executrix.

On March 29, 1906, the widow obtained probate of the will, the net value of the estate being sworn at 1078*l*.

On May 9, 1906, the purchase was completed, the widow executing the assignment to the London County Council as "personal representative of Joseph Baxter."

In taxing the costs to be paid by the London County Council, the taxing Master allowed the costs of obtaining probate of Baxter's will.

Joyce J., on a summons to review this taxation, held that these costs were not within those mentioned in s. 82 of the Lands Clauses Consolidation Act, 1845, and were therefore not payable by the London County Council.

The widow appealed.

P. O. Lawrence, K.C., and *Crossfield*, for the appellant. The expenses of taking out probate come exactly within the reasoning of this Court in *In re Thames Tunnel (Rotherhithe and Ratcliff) Act*, 1900 (1), with reference to the stewards' fees payable on admission to copyholds. Expenses of probate were allowed in *In re Bear Island Defence Works and Doyle* (2), but after the decision in *In re Thames Tunnel (Rotherhithe and Ratcliff) Act*, 1900 (1), that decision cannot be relied on. After the contract the vendor was a trustee for the purchaser to the extent that the estate in the property would have passed under a devise of trust estates prior to the Conveyancing Act, 1881: *Lysaght v. Edwards* (3); and this would be in the nature of an outstanding estate, for the getting in of which the purchaser must pay.

[*FARWELL L.J.* referred to *Rayner v. Preston*. (4)]

The executrix in this case does not derive her title from the probate, but from the will. Probate is merely evidencing her title. It is *the* evidence of title: *Williams on Executors*, 10th ed. p. 214; *Ingpen on Executors*, p. 63.

(1) [1908] 1 Ch. 493.

(2) [1903] 1 I. R. 164.

(3) (1876) 2 Ch. D. 499, 507.

(4) (1881) 18 Ch. D. 1.

[FLETCHER MOULTON L.J. She is bound to take out probate ; she must not intermeddle with the estate without it, otherwise she incurs certain penalties.

COZENS-HARDY M.R. referred to 55 Geo. 3, c. 184, s. 37.]

The executor is under no obligation to prove except for the payment of the duties, and these can be paid without taking out probate. The liability to penalties seems to be modified by 28 & 29 Vict. c. 104, s. 57. [44 & 45 Vict. c. 12, s. 40, and the Finance Act, 1894 (57 & 58 Vict. c. 30), s. 8, were also referred to.]

Taking out probate is certainly not "acquiring a right," it is only evidencing your right to property you already have. *In re Liverpool Improvement Act* (1) and *In re Lowry's Will* (2) are in favour of the contention that the cost of probate should be paid by the purchasers, as costs of evidencing title. There is no reason why the purchaser should not pay for this evidencing of title, even though probate had to be taken out for other reasons. [*In re Lloyd and North London Railway (City Branch) Act*, 1861 (3), was referred to.]

The executrix might have renounced probate without affecting her beneficial interest ; the purchasers would then have been obliged to get some one to take out probate with the will annexed, and would certainly then have had to pay the costs.

Jenkins, K.C., and *Christopher James*, for the respondents, were not called upon.

COZENS-HARDY M.R. In this case I feel no doubt that the judgment of Joyce J. was perfectly correct. The point is really a very short one, and in my opinion a very simple one. The vendor to the school board died after the contract and after the title had been accepted. His widow was executrix of his will, and she was also residuary legatee. It was her duty, imposed by statute, to take out probate. The statute of 55 Geo. 3, c. 184, and the subsequent statutes which have been referred to make it to my mind perfectly clear that such a duty is imposed upon the executor. It is enforced in the first instance under 55 Geo. 3, c. 184,

(1) (1868) L. R. 5 Eq. 282.

(2) (1872) L. R. 15 Eq. 78.

(3) [1896] 2 Ch. 397, 402.

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s. 37, by a penalty which may be sued for, and by a subsequent Act (28 & 29 Vict. c. 104), s. 57, it is enforced by a provision that an action may be brought in which 10 per cent. extra duty, or something of that kind, may be obtained. The executrix here performed her duty. She took out probate of the will before she was even required to do so by the school board; and now it is said that, by reason of the accident of the school board having acquired this property subject to the Lands Clauses Act, we are entitled to impose upon the school board the cost of taking out the probate, on the ground that the probate is merely evidence of the executor's title, because the executor may do, as beyond all doubt an executor may do, many things before probate is taken out. I am entirely unable to accept that view. I certainly am not prepared to say that an executor, who is simply discharging a statutory duty, can impose the charge upon the purchasing company of paying what is necessary to enable the executor to discharge that statutory duty. There is nothing in *In re Thames Tunnel (Rotherhithe and Ratcliff) Act*, 1900 (1), which in any way supports the contention, nor, when the authorities are looked at, is there to be found any trace of an authority in which the legal personal representative of the vendor has been a person who has taken out probate or administration; the only cases have been where there was an outstanding estate, for the purpose of getting in which representation was required, which is something very different indeed from the taking out of probate to the vendor himself. Whether those cases are right or wrong is a point we do not decide here. This is a case entirely different from them, and I think the view taken by Joyce J. was perfectly correct, and this appeal must be dismissed with costs.

FLETCHER MOULTON L.J. I am of the same opinion. Quite apart from this contract with the London County Council, there was a duty on the executrix to take out probate and to pay these costs, and she performed it. I cannot see anything in s. 82, or anything in the justice of the case, which would warrant our saying that the London County Council is to bear the cost of

her performing what was an independent statutory duty resting upon her, the performance of which was necessary to enable her to get possession of the estate.

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FARWELL L.J. I agree.

Sect. 82 distinguishes between getting in outstanding terms or interests in the land taken and producing, evidencing, and verifying title. It is not contended that this case falls within the first head, but it is said that this is evidencing the title. In my opinion evidencing the title means the production of evidence already existing of the vendor's title; it does not mean the creation of that title. The production of the probate would be evidence of the title, the procuring of probate would be the making of the title. The duty is cast upon the executor, and the absolute duty, within six months, of taking out probate; that he has to do irrespective of any action of the school board or any one else. The principle on which the Irish case was decided is in the respondents' favour. Holmes L.J. says in *In re Bear Island Defence Works and Doyle* (1): "The principle is that the involuntary vendor was satisfied with his title; it was good enough for him, and administration would not have been obtained except to comply with the requirements of the purchaser exercising compulsory powers." Here the involuntary vendor could not be satisfied with his title; he was bound to take out probate. His title was not good enough for him. Probate was bound to be obtained whether compulsory powers were exercised or not. In my opinion Joyce J. came to a perfectly correct conclusion.

Solicitors: *Crossfield, Cushing & Wheldon; E. Tanner.*

(1) [1903] 1 I. R. 167.

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Oct. 26, 27.

In re OFNER.SAMUEL *v.* OFNER.

[1908 O. 138.]

Will—Construction—Latent Ambiguity—Name—Misdescription—Extrinsic Evidence—Instructions—Admissibility.

A testator appointed one Dr. Alfred Ofner one of his executors and gave him a legacy of 200*l.*, and, among other legacies to various nieces and a nephew nominatim, he gave "to my grandnephew Robert Ofner" 100*l.*, and to another "grandnephew Curt Ofner" 100*l.* The testator had no grandnephew or other relative of the name of "Robert" Ofner, but he had four grandnephews, Alfred Ofner and Curt Ofner, who were correctly so described in the will, Richard Ofner, a brother of Alfred Ofner, and Botho Ofner. It was proposed to put in evidence a memorandum in the testator's handwriting that had been given by him to his solicitors as instructions for his will, in which the following words occurred: "to my grandnephew Dr. Alfred Ofner . . . 200*l.* . . . to his brother Robert Ofner 100*l.*":—

Held (reversing the decision of Swinfen Eady J.), that this document was admissible, not as evidence of intention, but to find out who the "grandnephew" was whom the testator had wrongfully described by the name "Robert," and if that were done it was clear that the brother of Dr. Alfred Ofner was intended to be the legatee, and that "Robert" was a mistake for "Richard."

The fact that this document also happened to be instructions for the will did not make it ipso facto any the less admissible, not as instructions, but as a contemporaneous and serious document explanatory of the meaning the testator had wrongly attributed to the name "Robert" when describing this legatee.

APPEAL from a decision of Swinfen Eady J., which raised the question of the admissibility of a document in the testator's own handwriting as explanatory of a latent ambiguity in his will. The will and the document in question, so far as material, were as follows:—

The testator, a native of Austria, by his will of November 14, 1905, appointed one "Dr. Alfred Ofner of Prague" one of his executors, and gave to the said Dr. Alfred Ofner in case he should prove his will the sum of 200*l.*, and in case he should not prove his will the sum of 100*l.*; he then gave various pecuniary

legacies to various nieces and a nephew nominatim, and "to my grandnephew Robert Ofner" 100*l.* and "to my grandnephew Curt Ofner" 200*l.*, and to various other relatives, by name, other legacies. The testator then devised and bequeathed all his real and personal estate unto and equally between "All of them the said Dr. Alfred Ofner, . . . Robert Ofner, . . . Curt Ofner," and the other previously-named legatees in equal shares.

The testator died in April, 1907.

The testator had no grandnephew or other relative of the name of "Robert Ofner," but he had four, and only four, grandnephews—(1.) Dr. Alfred Ofner and (2.) Richard Ofner, who were brothers, and (3.) Curt Ofner and (4.) Botho Ofner. In order to clear up the difficulty caused by this misdescription, it was proposed, on the hearing of an originating summons for the opinion of the Court on the construction of the will, to put in as evidence a memorandum alleged to be in the testator's own handwriting that had been given by him to his solicitors in connection with the preparation of his will, the material part of which was as follows: "to my grandnephew Dr. Alfred Ofner of Prague 200*l.* if he proves my will if not 100*l.* To his brother Robert Ofner 100*l.*"

When the matter was before Swinfen Eady J. it was not strictly proved that this memorandum was in the handwriting of the testator.

Swinfen Eady J. refused to admit this memorandum as evidence and held that the legacy to Robert failed for uncertainty, and that he also took no benefit in the residuary estate.

Richard Ofner, who claimed the benefit given to "Robert" Ofner by the will, appealed.

When the appeal was called on, application was made on behalf of the appellants for leave to put in an affidavit by a bank clerk, who was well acquainted with the testator's signature and writing, to prove that the memorandum was wholly in the testator's handwriting, and this further evidence was allowed to be read.

Devonshire, for the appellant. This memorandum, if admitted, makes it clear that the testator has misdescribed Richard,

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the brother of Dr. Alfred Ofner, by calling him Robert. The memorandum is admissible, in the first place, because it is a contemporaneous document explanatory of the meaning which this testator had wrongly attributed to the name "Robert" when describing this legatee; and, secondly, because this is a case of equivocation, for the description "grandnephew" applies unambiguously to more than two persons, and the guiding principle in such a case is that equivocation lets in evidence of intention: *Doe v. Hiscocks* (1); *Doe v. Needs* (2); Wigram on Extrinsic Evidence, proposition 7.

[FARWELL L.J. Your first point ought to be sufficient. You need not at present argue the question of equivocation.]

Had this document been a letter, and not instructions, it would certainly have been admissible as explanatory of the words used, just as the letter in *Bernasconi v. Atkinson* (3) was admitted, and as extrinsic evidence was admitted to explain the meaning of certain letters in *Kell v. Charmer*. (4) On this principle former wills were held to be admissible in *In re Feltham's Trusts*. (5) The present case is distinguishable from *Drake v. Drake*. (6) A partial blank in the will was explained by extrinsic evidence in *In the Estate of Hubbuck*. (7) The mere fact that this contemporaneous document happens also to be instructions does not of itself make it inadmissible as explanatory of the testator's meaning when describing this legatee. [Wigram on Extrinsic Evidence, propositions 3 and 5, was also referred to.]

A. M. Latter, for the other residuary legatees. A document that is nothing more than instructions for a will is not admissible. Evidence of facts and surrounding circumstances only is admissible; instructions for a will can be nothing more than instructions, and therefore cannot be admitted; this seems clear from *Doe v. Hiscocks* (8), *Drake v. Drake* (9), and *Charter v. Charter*. (10) The evidence of the solicitor who had prepared the will was not admitted in *Bernasconi v. Atkinson*. (3) No evidence is admissible

(1) (1839) 5 M. & W. 363.

(2) (1836) 2 M. & W. 129.

(3) (1853) 10 Hare, 345.

(4) (1856) 23 Beav. 195.

(5) (1855) 1 K. & J. 528, 532.

(6) (1860) 8 H. L. C. 172.

(7) [1905] P. 129.

(8) 5 M. & W. 367, 370.

(9) 8 H. L. C. 181.

(10) (1874) L. R. 7 H. L. 364.

at this point unless it goes to the extent of proving a habit on the part of this testator to call his grandnephew Richard by the name of Robert. One document of this kind will not prove a habit: *In re Ely*. (1)

[FARWELL L.J. Theobald on Wills, 7th ed. p. 265, treats that decision as wrong, and I too think it was.

COZENS-HARDY M.R. referred to *In re Waller*. (2)]

That was a case in which the use of a wrong name in several previous wills was taken to prove a habit. Evidence of this kind, which amounts to nothing more than extrinsic evidence of the testator's intention, is not admissible: *In re Cheadle*. (3)

COZENS-HARDY M.R. This case raises a question of considerable interest and, I think, of considerable importance. I feel we are indebted to counsel on both sides for the assistance which they have given, and, having listened to the arguments, I have arrived at the conclusion that the appellant is right. [Having stated the will and the facts, his Lordship continued:—]

One cannot suppose the testator intended to make a gift to a non-existing person. According to the language of Wood V.-C. in *Bernasconi v. Atkinson* (4), "the Courts have a right to ascertain all the facts which were known to the testator at the time he made his will, or (as it has been expressed), to place themselves in the testator's position, in order to ascertain whether there exists any person or thing to which the description can be reasonably and with sufficient certainty applied,—the presumption necessarily being, that the testator intended some existing matter or person." Therefore it seems to me we start with this, that the testator did intend some person by the words "my grandnephew Robert Ofner." There must therefore be a misdescription somewhere, and what we have to discover is whether there is any person, whom he has misdescribed by the term "Robert Ofner"—whether, in fact, "Robert" was a phrase which he incorrectly used to describe the person who was really "Richard" the brother of Alfred. We have had a very interesting argument to the effect that no evidence at all is admissible

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(1) (1891) 65 L. T. 452.

(2) (1899) 80 L. T. 701.

(3) [1900] 2 Ch. 620.

(4) 10 Hare, 348.

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on that point, unless it goes to the extent of proving a habit of the testator to call his grandnephew Richard by the name of Robert, and we have had a further argument that a document, which I will refer to more particularly in a minute, cannot be looked at at all to assist us in ascertaining whether it was a misdescription because the document is really instructions for a will. I am unable to agree with either of those propositions. Of course, if you can prove a habit of the testator you may do that, because it is so much clearer than anything else, but I shrink from saying that evidence is not admissible unless it goes to the extent of habit. If, for instance, you could prove that the testator had at or about the date of his will written to his grandnephew Alfred's brother and had addressed it to him as "Robert," and if you had nothing more than that, I think such evidence would be admissible to shew that Richard was the person really meant by "Robert." The weight of a particular document is of course a different matter from its admissibility. When you find a document practically contemporaneous with the will, and a document of intrinsic importance in itself, I shrink from saying not only that it is not an admissible document, but that it is not a document which in the absence of all counter-vailing evidence ought to be acted upon by the Court.

But then it is said that, even if that is true as to anything else, it cannot be true if you are dealing with instructions for a will. That leads me to refer to the document, the only document we have here—it is a document which has been proved to be wholly in the testator's own handwriting. We have seen the document, and it was properly proved by evidence which we admitted here. In that document, which was handed to his solicitor as instructions, he states, after giving the legacy of 200*l.* to Dr. Alfred if he proved the will, and if not 100*l.*, that he gives, "To his brother Robert Ofner 100*l.*" What are we looking at that document for? We are not looking at it at all for the purpose of gathering what the testator intended to do, but merely as evidence that he thought that the brother of Alfred was Robert, and that he called him so, and that, therefore, the phrase in the will "Robert," who otherwise is a non-existing person, must apply to and ought to apply to Richard. To my mind we are not asked to use

these instructions for any improper purpose. I regard them exactly the same as (neither better nor worse than) a letter written on a formal occasion by the testator in which he had in terms referred to the brother of Dr. Alfred Ofner as Robert Ofner. That seems to me to shew that when he used in his will the inaccurate term "Robert Ofner" he really meant Richard Ofner, the person whom he, by the practically contemporaneous document, described as the brother of Alfred. Our attention has been called to a number of authorities. I shall be content to base my judgment upon what was said by Wood V.-C. in *Bernasconi v. Atkinson* (1), a case which, so far as I am aware, has never been questioned, and which was cited, I think with approval, by all the judges in *Charter v. Charter* (2), and which says this (3): "I find by a letter which is put in evidence, that the testator addressed the plaintiff by the name of Vincent Bernasconi"—not his true name. "I am entitled to look at the letter for this purpose, but not to ascertain the intention of the testator." I look at these instructions for a will to find that the testator treated Dr. Alfred's brother as being really Robert. I look at it for that purpose only, and, looking at it for that purpose only, I do not feel bound to declare, as Swinfen Eady J. has, that the whole gift is void for uncertainty, but I find sufficient evidence here to enable me to say that by the word "Robert" used in the will the testator meant Richard the brother of Dr. Alfred. I think there are ample authorities to be found in support of this view, authorities which perhaps more commonly arise in cases of gifts to charities which are misdescribed. We are all familiar with cases in which a legacy is given to a charity by an inaccurate name, and then evidence is tendered to this effect: the testator may have described a charity in a written document by its wrong name, may have given a cheque to it in a wrong name; the evidence is admissible to shew what was the particular charity intended by the inaccurate description used in the will. You do not use it for any other purpose than that, to identify the person or object who has been misdescribed. Of course you first have to prove that there is no person

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(1) 10 Hare, 345.

(2) L. R. 7 H. L. 364.

(3) 10 Hare, 354.

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answering the description of the words used according to their strict tenor, and then you are perfectly entitled to do what we are asked to do here, namely, to look at any document, substantially contemporaneous, of an important character which shews who the person was whom the testator had in his mind and intended by the misdescription. In the absence of other evidence I think that is sufficient, and, that being so, this appeal must be allowed. Farwell L.J. reminds me that Swinfen Eady J. had not before him the evidence which we have had, because he said, quite properly, that it was not proved before him that the document tendered was in the testator's handwriting. If it had not been so proved, no doubt entirely different considerations would have applied. But having this additional evidence before us I think we ought to act upon it and to declare that Richard is the person intended by the misdescription of Robert in the will.

FLETCHER MOULTON L.J. I am entirely of the same opinion. In this will we find a group of legacies to relatives of the testator, each described by his relationship. In the middle of that group we find a legacy "To my grandnephew Robert Ofner." It is established before us that there was no one in the family of the name of Robert, and therefore, unless we are to suppose that he called a relative a person who was not a relative at all (which is not suggested by any of the parties), we must come to the conclusion that the word "Robert" is an error. But I can see no reason to think that the description "grandnephew" is in any way erroneous. Therefore we have a legacy to a grandnephew who is described by a wrong name. It is clear from this that the testator believed he had a grandnephew named Robert, but who that grandnephew was remains for the present an uncertainty. In a document which we now know is entirely in the testator's handwriting, written almost at the same time, and written under circumstances under which a man would be likely to write with at least ordinary accuracy on account of the importance of the occasion (which I will deal with in a moment), he speaks of his grandnephew Dr. Alfred Ofner and his brother Robert Ofner; in other words, when writing that document he evidently thought that the grandnephew who was the brother of Alfred Ofner had

the name Robert. Both this document and the will itself are documents in which there is every probability that the testator used his best knowledge, and I unhesitatingly come to the conclusion that at the time of making his will he was under the erroneous impression that the brother of Alfred Ofner was called "Robert," whereas in fact he was called "Richard." If that be so, we must read the will as though it were "Richard." This does not alter the will, it is only the correction of a misdescription which our examination of the will by the light of the extrinsic evidence enables us to correct. It is suggested that we cannot look at this document because it was instructions for this particular will. The fact that it was instructions for a will does not on the one hand help its admissibility in this case so far as the point with which I am dealing is concerned. But, on the other hand, it does not take away from its admissibility. It remains a document written under circumstances which lead us to imply that it was written with at least ordinary care, and it was written very shortly before the making of the will. I do not look at it for one moment as indicating a testamentary intention. I simply look upon it as shewing that this testator bona fide thought that the name of the brother of Alfred Ofner was Robert, and I conclude, in the absence of all contradictory evidence, that he remained in that belief when he made his will, and that, therefore, his "grandnephew Robert" means the grandnephew the brother of Alfred Ofner, that is, Richard Ofner.

For these reasons I am of opinion that the appeal must be allowed.

FARWELL L.J. I am of the same opinion. In construing a will the Court has to ascertain not what the testator actually intended as distinguished from what his words have expressed, but what is the meaning of the words he has used. As Wigram on Extrinsic Evidence puts it, any evidence is admissible which, in its nature and effect, simply explains what the testator has written, and no evidence can be admissible which, in its nature and effect, is applicable for the purpose of shewing what he really intended. Applying that to the

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present case, evidence has always been admitted, and properly admitted, to shew who are the persons mentioned in the testator's will. When you ascertain that one of those persons, by the name by which he is called, has no existence, evidence is admissible to shew what the testator knew about the family, and so on; and evidence is admissible to shew that he has always been in the habit of calling one of the family John Richard, or vice versa. A man always having called John Richard is then presumed in his will to have meant John when he says Richard. That is construing the words which he used. In my opinion it is not confined to a question of habit. There are many cases, and probably this is one, in which the testator did not know his relations very intimately (this testator lived in England, and had grandnephews in Berlin), and he was not in the habit of communicating with them or speaking of them in any way; at any rate no evidence is before us that he did. The one instance in which he has on an occasion of importance spoken of Richard as Robert is admissible to shew that Richard in his mind meant Robert on all occasions when he had occasion to use the name. It is admissible, and then arises the question of the weight of the evidence. It might very well be, and I think probably would be, that if evidence had been given in contradiction shewing that the testator had been in the habit of writing to Richard as Richard, we should not have been able to allow this to countervail it, and that, perhaps, is a way of pointing the difference between using this document as a mere document and using it as instructions. The document is admissible in evidence not because, but notwithstanding, that it is instructions for the will. It could not be used as evidence in contradiction of a proved habit of calling Richard Richard in letters and so on, simply because this document is instructions, for that would be to put it forward as evidence of intention as distinct from evidence of the meaning of the name; it could only be used as evidence that might be weighed in the balance with other matters to countervail the general habit of the testator of calling Robert Richard and to shew that there were sufficient instances in which he called him Robert to outweigh them. This is certainly not new. There is the case of *In re*

Waller (1), which is rather a special one ; but the point is well put by Wood V.-C. in the case of *In re Feltham's Trusts*, where he says (2) : " Further, which is extremely important, there is the fact of her making a former will. I cannot rely on the circumstance that she therein gave him a legacy ; but by that will, which was an instrument solemnly executed, she described one of her legatees as Thomas Turner, of Regency Square, Brighton, surgeon. No one could doubt that, in that instrument, the testatrix meant by this description the gentleman who really resided at Regency Square, and was a surgeon. That will was made only three or four years before the will now in question. Therefore, looking to this evidence, which is plainly admissible, namely, that in a solemn instrument she had previously described Joseph Turner indubitably by the name of Thomas, and the only question being, is the name 'Thomas' or the description incorrect in this will, I have no hesitation in concluding, that the same person who, three years before, was described by her with the same degree of incorrectness, was present to her mind when she made her second will ; and there being nothing to shew that she had ever learned her mistake in the interval, I must come to the conclusion that the same mistake continued in her mind, and that the misdescription was in the name, and not in the address, of the legatee." To apply that here, I regard this document in writing in the testator's handwriting as a solemn instrument, an instrument of importance, the only one that we have before us in which he spoke of Richard as Robert. That being so, I think there is sufficient evidence in this particular case to shew, when he used the name "Robert" in the will, by that he expressed "Richard."

Solicitors : *Gilbert Samuel & Co.*

(1) 80 L. T. 701.

(2) 1 K. & J. 532.

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MARRIOTT v. EAST GRINSTEAD GAS AND WATER
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[1908 M. 1234.]

Water Company — Special Acts — Unauthorized new Waterworks — Ancillary Main under Public Footpath—Soil in Plaintiff—Trespass—Ultra vires—Plaintiff's Right to sue without Attorney-General—Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), ss. 28, 29.

Sect. 28 of the Waterworks Clauses Act, 1847, merely enables a water company to lay pipes under streets in connection with the undertaking authorized by their special Acts, and if they are being laid in connection with unauthorized works, the owner of the soil can sue the water company in trespass, raise the question of ultra vires, and obtain an injunction without joining the Attorney-General.

Liverpool Corporation v. Chorley Waterworks Co., (1852) 2 D. M. & G. 852, 860, and *Cardiff Corporation v. Cardiff Waterworks Co.*, (1859) 5 Jur. (N.S.) 953; 4 De G. & J. 596, applied.

The fact that the damage is small is immaterial: *Goodson v. Richardson*, (1874) L. R. 9 Ch. 221, applied.

Semble, a public street or footpath is "land dedicated to public use" within the meaning of s. 29, so that pipes in connection with authorized works could be laid without the consent of the owner of the soil.

WITNESS ACTION.

This was an action of trespass. It was brought to restrain the defendants from laying pipes in connection with their new waterworks at Hackenden under a public footpath running along the west of the plaintiffs' land. The footpath was not repairable by the inhabitants at large and was under the control and management of the plaintiffs. The plaintiffs alleged that the Hackenden works were not authorized by the defendants' special Acts, namely, the East Grinstead Gas and Water Act, 1878 (41 & 42 Vict. c. lxxvi.), and the East Grinstead Gas and Water Act, 1892 (55 & 56 Vict. c. civ.), both of which incorporated the Waterworks Clauses Act, 1847.

The original waterworks, consisting of a well and pumping station and water tower and service tank, with all necessary works and conveniences connected therewith, had been duly erected in East Grinstead on the site specified in the Act of 1878.

Additional waterworks on another specified site were subsequently authorized by the Act of 1892 with the view of obtaining a further supply, but, the site being found unsuitable, the works were not constructed, and the scheme was abandoned.

In 1899 the defendants acquired three acres of land at Hackenden under a power to purchase a limited quantity of additional land by agreement for the purposes of their undertaking. On this site, which was two-thirds of a mile from their original waterworks, they sank a well and erected a steam pump and engine-house.

They also laid a five-inch main to the original water tower. Part of the water continued to be supplied from the tower well, but the greater part was pumped from Hackenden to the tower tank, whence it was distributed.

On December 5, 1906, the engineer reported that the Hackenden source was far the best in every way, and advised increased machinery. This was provided in 1907, and the whole of the daily supply was obtained and the distribution mains charged direct from Hackenden, the overflow only going into the tower tank.

The pumping at Hackenden ceased at night, and the tower tank was then kept charged by the tower pump and well. But the night consumption was small, and in substance the whole supply was now obtained from Hackenden.

The defendants were now connecting up the existing mains at three of their highest points direct with the Hackenden works by means of a six-inch main which they were about to lay in part under the plaintiffs' footpath. This main would chiefly be used for distributing Hackenden water, but to a small extent it would also be used for distributing water from the original tower well.

The defendants had given notice of their intention of laying the main under the footpath to the district council surveyor, but they had not given notice to the plaintiffs under s. 30 of the Waterworks Clauses Act, 1847, or obtained their consent under s. 29.

The plaintiffs brought this action for:—

(1.) A declaration that the defendants were not entitled in connection with the said works at Hackenden to lay down or

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place any pipes, conduits, service pipes, or other works in the plaintiffs' footpath;

(2.) Alternatively a declaration that the defendants were not entitled to lay such pipes or other works without giving notice thereof to and obtaining the consent of the plaintiffs;

(3.) An injunction.

The defendants rested their case on three grounds :—

First, they said that the Hackenden works were authorized by the powers of their special Acts, which were wider than the powers of the Frimley Act, construed in *Attorney-General v. Frimley and Farnborough District Water Co.* (1) On this point they failed, the Court holding that the Acts were on this point not distinguishable.

Secondly, they said that the *Frimley Case* (1) was confined to construction works, and did not affect distribution works, such as the proposed main, which they were independently entitled to lay down under s. 28 of the Waterworks Clauses Act, 1847. On this point they said the question of ultra vires of the Hackenden works was immaterial. They admitted that the plaintiffs were entitled to formal notice, but denied that their consent was necessary.

Thirdly, they said that if the question of ultra vires in fact arose, it must be raised by the Attorney-General.

The second and third points are alone reported.

Hon. Frank Russell, K.C., and *Manning*, for the plaintiffs. If, as the plaintiffs contend, the Hackenden works are ultra vires, the proposed main to be laid in connection therewith is also ultra vires. On this point the suggested distinction between construction and distribution works does not exist. The principle of the *Frimley Case* (1) applies to both. Sect. 28 of the Waterworks Clauses Act, 1847 (2), read with ss. 1, 2, 3, clearly only

(1) [1908] 1 Ch. 727.

(2) The Waterworks Clauses Act, 1847, provides as follows :—

Sect. 1: "This Act shall extend only to such waterworks as shall be authorized by any Act of Parliament hereafter to be passed, which shall declare that this Act shall be in-

corporated therewith, and all the clauses of this Act, save so far as they shall be expressly varied or excepted by any such Act, shall apply to the undertaking authorized thereby, so far as the same shall be applicable to such undertaking, and shall with the clauses of every other

authorizes the laying of pipes in connection with the undertaking authorized by the special Acts. It does not give the defendants

Act which shall be incorporated therewith, form part of such Act, and be construed therewith as forming one Act."

"And with respect to the construction of this Act, and any Act incorporated therewith, be it enacted as follows:

Sect. 2: ". . . . The expression 'the undertaking' shall mean the waterworks, and the works connected therewith, by the special Act authorized to be constructed; and the expression 'the undertakers' shall mean the persons by the special Act authorized to construct the waterworks."

Sect. 3: ". . . . The expression 'the waterworks' shall mean the waterworks, and the works connected therewith, by the special Act authorized to be constructed;"

"And with respect to the construction of the waterworks, be it enacted as follows:" (Here follow ss. 6 to 15, of which s. 12 is alone material.)

Sect. 12: "Subject to the provisions and restrictions in this and the special Act, and any Act incorporated therewith, the undertakers may execute any of the following works for constructing the waterworks; (that is to say),

"They may enter upon any lands and other places described on the said plans and in the said books of reference, and take levels of the same, and set out such parts thereof as they shall think necessary, and dig and break up the soil of such lands, and trench and sough the same, and remove or use all earth,

stone, mines, minerals, trees, or other things dug or gotten out of the same:

"They may from time to time sink such wells or shafts, and make, maintain, alter, or discontinue such reservoirs, waterworks, cisterns, tanks, aqueducts, drains, cuts, sluices, pipes, culverts, engines, and other works, and erect such buildings, upon the lands and streams authorized to be taken by them, as they shall think proper, for supplying the inhabitants of the town or district within the prescribed limits with water:

"They may from time to time divert and impound the water from the streams mentioned for that purpose in the special Act, or the said plans or books of reference, and alter the course of any such streams, not being navigable, and also take such waters as may be found in and under or on the lands to be taken for constructing the works:

"Provided always that the undertakers shall make full compensation to all parties interested for all damage sustained by them through the exercise of such powers."

"And with respect to the breaking up of streets for the purpose of laying pipes, be it enacted as follows:

Sect. 28: "The undertakers, under such superintendence as is hereinafter specified, may open and break up the soil of the several streets within the limits of the special Act and lay down and place

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a power in gross to lay pipes ad libitum within the limits of supply.

It is now admitted that the plaintiffs are entitled to notice under s. 30, and an informal notice has in fact been given since action brought.

The plaintiffs' consent is also necessary under s. 29, even if the defendants' acts are intra vires. The footpath is no doubt "dedicated to public use" as a footpath or highway; but, except for that purpose, the land or subsoil is not so dedicated, and is vested in the plaintiffs: *Tunbridge Wells Corporation v. Baird*. (1)

[SWINFEN EADY J. A highway is usually vested in the adjoining owners, subject to the right of the public to pass and repass. On the plaintiffs' construction of s. 29 there would be scarcely a highway in England in which water companies could lay pipes without the consent of the adjoining owners. That cannot have been intended. I think this footpath is land "dedicated to public use" within the meaning of the section.]

within the same limits pipes, conduits, service pipes, and other works and engines . . . and do all other acts which the undertakers shall from time to time deem necessary for supplying water to the inhabitants of the district included within the said limits, doing as little damage as can be in the execution of the powers hereby or by the special Act granted, and making compensation for any damage which may be done in the execution of such powers."

Sect. 29: "Provided always, that nothing herein contained shall authorize or empower the undertakers to lay down or place any pipe, conduit, service pipe, or other work in any land not dedicated to public use without the consent of the owners and occupiers thereof . . ."

Sect. 30: "Before the undertakers open or break up any street . . . they shall give to the persons under

whose control or management the same may be . . . notice in writing of their intention to open or break up the same, not less than three clear days before beginning such work . . ."

Sect. 31: "No such street . . . shall . . . be opened or broken up, except under the superintendence of the persons having the control or management thereof . . . and according to such plan as shall be approved of by such persons . . ."

Sect. 35, commencing a group of sections dealing with the supply of water to be furnished by the undertakers, compels the undertakers to provide and keep in the pipes to be laid down by them a supply of pure and wholesome water, sufficient for the domestic use of all the inhabitants of the town or district within the limits of the special Act, and to lay pipes for that purpose.

(1) [1896] A. C. 434.

We cannot press the point further.

The last suggestion is that the plaintiffs cannot raise the question of ultra vires without the Attorney-General. Why not? The plaintiffs sue for trespass on their freehold.

The defendants justify under their special Acts. The onus is on them to shew that the trespass is intra vires and authorized. No doubt if the plaintiffs were outsiders trying to stop the carrying on of the Hackenden works as ultra vires they could only do so through the Attorney-General. But here they are merely seeking to restrain a trespass on their private freehold, and it would be quite irregular to join the Attorney-General in such a case. Apart from this point, the plaintiffs, as freeholders, have "a special or private interest in confining the defendants within the limits of their parliamentary powers" in regard to these pipes, and are therefore entitled to sue alone and obtain an injunction: *Liverpool Corporation v. Chorley Waterworks Co.* (1); *Cardiff Corporation v. Cardiff Waterworks Co.* (2); although the actual damage may be small: *Goodson v. Richardson* (3); *Herron v. Rathmines and Rathgar Improvement Commissioners.* (4)

Sir C. A. Cripps, K.C., Hon. E. C. Macnaghten, K.C., and Percy Wheeler, for the defendants. Even if the Hackenden works are ultra vires within the *Frimley Case* (5), which is not admitted, the proposed main is not ultra vires. The *Frimley Case* (5) was concerned with construction works under s. 12 of the Waterworks Clauses Act, 1847. It does not touch the question of distribution works, which are regulated by an entirely different group of sections. The construction works are always strictly defined by the special Act. The distribution works are almost necessarily left to the company's discretion. Sect. 12, which deals with the construction works, is expressly prefaced by the words "Subject to the provisions and restrictions in this and the special Act, and any Act incorporated therewith." Sect. 28 imposes no such restriction, but contains an independent power to lay pipes for supplying water in the authorized area. In the *Cardiff Case* (2)

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(1) 2 D. M. & G. 852, 860.

(3) L. R. 9 Ch. 221.

(2) 5 Jur. (N.S.) 953; 4 De G. & J.
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(4) [1892] A. C. 498.

(5) [1908] 1 Ch. 727.

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it was intended to supply water outside as well as within the authorized area, so that s. 28 gave no protection. Here the pipes are being laid for the supply of water in an authorized area. The gravamen of the complaint is that the water will be partly drawn from a source alleged to be unauthorized. But when pipes are being laid under s. 28 the legality of the source is immaterial. No doubt the company can only supply water from an authorized source. They are equally bound to supply pure water. But the legality of the source and the purity of the water are matters for the Attorney-General, and cannot be raised by a side wind at the instance of any owner of property in a back street where a pipe happens to be laid under s. 28. Such a construction would render a water company's undertaking unworkable. The question of ultra vires can only be raised by the Attorney-General, the ratepayers, the shareholders, or individuals having a special interest in the question: *Liverpool Corporation v. Chorley Waterworks Co.* (1); *Stockport District Waterworks Co. v. Manchester Corporation* (2); *Pudsey Coal Gas Co. v. Bradford Corporation*. (3) In the present case the plaintiffs have no special interest in the question of ultra vires of the Hackenden source. Suppose the pipes had been laid before the construction of the Hackenden works, and had been used in connection with the original tower well, the plaintiffs could not have objected. Suppose that subsequently unauthorized water was pumped through the pipes, the plaintiffs could still not have objected as private owners. The question of what water passes through the pipes does not affect them individually as private owners, but is a matter for the Attorney-General. The same considerations apply to the present case. As private freeholders the plaintiffs are directly affected by having the pipes laid in their footpath, and are entitled to compensation for damage under s. 28. But as private owners they are not affected by the alleged illegality of the source of supply, and if they wish to raise that question they must join the Attorney-General.

Hon. Frank Russell, K.C., in reply.

(1) 2 D. M. & G. 852, 860.

(2) (1862) 9 Jur. (N.S.) 266.

(3) (1873) L. R. 15 Eq. 167.

SWINFEN EADY J., after stating the facts and holding that the Hackenden works were not ancillary to the defendants' statutory undertaking, but were a new undertaking ultra vires their special Acts, which on this point were not distinguishable from the special Act in the *Frimley Case* (1), continued :—"The defendants contend that the illegality of the Hackenden works is immaterial, because s. 28 of the Waterworks Clauses Act, 1847, which statute is incorporated with the defendants' special Acts, enables them to lay any mains or pipes that they may deem necessary for supplying water to the inhabitants of the district included within their limits. They contend that this is a general power, and not restricted in any way by reference to the authorized works. They compare the language of s. 28 with s. 12. Sect. 12 commences: "Subject to the provisions and restrictions in this and the special Act, and any Act incorporated therewith, the undertakers may execute any of the following works for constructing the waterworks." They contend that s. 12 applies to the construction of the waterworks only, and point out that s. 28 contains no such introductory proviso. They therefore contend that s. 28 gives them an absolute statutory right or power in gross to lay down any mains and pipes they consider necessary for supplying water to the inhabitants of the district within the limits of supply, irrespective of their statutory undertaking. The answer to that argument is that all the powers of the Acts, that is, the special Acts and the Waterworks Clauses Act incorporated therewith, apply only to the statutory undertaking and are conferred for the purpose of carrying it out. Sect. 1 of the Waterworks Clauses Act, 1847, makes that clear. It provides that all the clauses of this Act, save so far as expressly varied or excepted by the special Act, "shall apply to the undertaking authorized thereby, so far as the same shall be applicable to such undertaking, and shall with the clauses of every other Act which shall be incorporated therewith, form part of such Act, and be construed therewith as forming one Act." So that the provisions of the Act of 1847 are read into the defendants' special Acts, and they are to be construed as forming one Act, and in my opinion these clauses for laying pipes and mains are

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all subsidiary clauses and powers necessary to enable the defendants to carry out their main, i.e., their authorized, undertaking, and are to be read as referring to that authorized undertaking.

In my judgment the defendants have no general power in gross to lay pipes of any dimensions for supplying water from any source they think fit within their limits of supply.

The defendants then contend that, even if their acts are ultra vires, that objection can only be raised by the Attorney-General, and that the plaintiffs are not entitled to raise the point, even though it is in their land that the defendants are claiming a statutory right to insert their pipes. The law as to suing in cases of ultra vires was stated by Lord Cranworth L.J. in *Liverpool Corporation v. Chorley Waterworks Co.* (1) He said: "In such cases (we of course except any proceeding at the instance of the Attorney-General) a plaintiff seeking the assistance of a Court of Equity, by way of injunction, is bound to show that he has an interest in preventing the defendants from doing what is in fact, or may well be called, a violation of their contract with the Legislature. He must show, not only that the defendants are committing or intend to commit a wrong, but also that the wrong, complained of, does occasion or will occasion loss or damage to him; that he has a special or private interest in confining the defendants within the limits of their parliamentary powers." In my opinion the plaintiffs, as freeholders of the land in which this main is proposed to be laid, have established that special or private interest, and are entitled to sue, their claim really being for an injunction to restrain the defendants from trespassing on their land by inserting the pipes in question.

If precedent were needed there is a precedent for an injunction in the *Cardiff Case*. (2) In that case the Cardiff Waterworks Company were proceeding to lay down pipes necessary for supplying water within the limits of supply, but also intended to carry water beyond those limits. Wood V.-C. granted an injunction to restrain them. On appeal that injunction was dissolved, but only on the ground that there was some dispute as to what the limits of supply actually were. It was a question whether

(1) 2 D. M. & G. 852, 860.

(2) 5 Jur. (N.S.) 953; 4 De G. & J. 596.

they extended to the port of Cardiff as defined for customs purposes, or only to the port in its ordinary and popular sense, and that question was left open, but the grounds upon which the Vice-Chancellor granted the injunction are not impeached by what took place in the Court of Appeal.

The defendants then contend that the plaintiffs will sustain very little damage, as the pipes are to be laid under a public footpath or highway. A somewhat similar point arose in *Goodson v. Richardson*. (1) In that case the owner of the soil of a highway objected to pipes being laid in his soil by an unauthorized person, and Jessel M.R. granted an injunction to restrain the continuance of the pipes. Lord Selborne L.C. and James and Mellish L.JJ. sustained the injunction on appeal, although the soil under the highway was of no value to the owner.

In these circumstances I am of opinion that the plaintiffs have established their right to the following relief, namely: First, a declaration that the defendants are not entitled in connection with their waterworks at Hackenden to lay down the six-inch main which they are threatening and intending to lay down; secondly, a declaration that the defendants are not entitled to lay down any mains, pipes, conduits, service pipes, or other works or engines in or under the public footway on the west side of the plaintiffs' property without giving notice thereof to the plaintiffs; thirdly, an injunction restraining the defendants, their servants and agents, from laying down or placing a six-inch main, or any other pipes or works in connection with their works and pumping station at Hackenden, under the said footpath. The costs must follow the result.

Solicitors: *Hasties; Turner & Evans, for Evelyn Alston Head, East Grinstead.*

(1) L. R. 9 Ch. 221.

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In re POPULAR LIFE ASSURANCE COMPANY,
LIMITED.

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[1907 P. 089.]

Nov. 7.

Life Assurance Company—Deposit—Amalgamation—Dissolution—Repayment of Deposit—Life Assurance Companies Act, 1870 (33 & 34 Vict. c. 61), s. 3.

In 1904 the Popular Life Assurance Company was incorporated and made the statutory deposit of 20,000*l*. They did not accumulate out of premiums any life assurance fund ; and in 1906 they agreed to sell their business and assets to the United Provident Assurance Company in consideration of shares in that company. The vendor company passed resolutions for a voluntary winding-up, and their property and policies had been transferred, the shares allotted, all claims on the vendor company discharged, and the company itself dissolved. The purchasing company now petitioned for the payment out of Court to them of the 20,000*l*. deposited by the vendor company :—

Held, that although the vendor company had not accumulated a life assurance fund, yet, inasmuch as their obligations had come to an end on dissolution, the deposit ought to be paid out to the petitioners as their assignees.

Ex parte Scottish Economic Life Assurance Society, (1890) 45 Ch. D. 220, distinguished.

PETITION.

This was an application by the United Provident Assurance Company, Limited, to obtain the transfer or payment out of Court to them of a sum of 21,621*l*. 11*s*. 4*d*. London County stock.

The Popular Life Assurance Company, Limited, was incorporated in 1904 with the object of carrying on life assurance in all its branches, and on June 13 in that year made the statutory deposit required by s. 3 of the Life Assurance Companies Act, 1870, by lodging in the hands of the Paymaster-General the sum of 20,000*l*. It had not accumulated out of premiums any life assurance fund. On October 24, 1906, an agreement was entered into whereby the Popular Life Assurance Company was to sell and transfer all its business, policies, and assets, except its uncalled capital, to the petitioning company ; the consideration was to be paid in shares of the petitioning company. The Popular Life Assurance Company was to be wound up voluntarily, and the petitioners were to pay and discharge all the

liabilities and obligations of the vendor company. On December 1 and 18, 1906, special resolutions for the voluntary winding up of the vendor company were passed and confirmed.

By an agreement of February 26, 1907, the petitioning company were forthwith, upon the principal agreement being sanctioned by the Court, to grant to the holder of each policy of the vendor company which should then be in force the right of insurance with the petitioning company upon the same terms as his subsisting policy; and the vendor company, in order effectually to transfer all the assets to the petitioning company, were to authorize the latter to use their name in any application which might be made subsequent to the completion of the purchase relating to the transfer, payment, or other dealing with the sum of 20,000*l.* deposited by the vendor company as above mentioned.

On March 12, 1907, the agreements were sanctioned by the Court. Since that date all the property, goodwill, and assets of the vendor company had been transferred to the petitioning company, with the exception of 8000*l.* in the hands of trustees and the 20,000*l.* on deposit or the investments representing the same. The policies had been transferred and premiums paid to the petitioning company, and the shares allotted.

In order to provide against all possible claims against the vendor company and its liquidator, securities to the value of about 20,000*l.* were handed to trustees upon trust to discharge such claims until the dissolution of the company, and afterwards upon trust for the petitioners. Circulars were sent out and advertisements published, and all claims had been discharged, except one small one which was disputed, and about 8000*l.* remained in the hands of the trustees as above mentioned. The petitioning company had a fund accumulated out of premiums amounting to about 70,000*l.*, and they had also on starting business deposited 20,000*l.*, which was still in Court. On December 14, 1907, an order was made by Parker J. carrying over the deposited fund, now amounting to 21,621*l.* 11*s.* 4*d.*, to the ledger credit the account of ex parte the United Provident Assurance Company, Limited, and that the petition should stand over till after the dissolution of the vendor company.

On June 25, 1908, a final meeting of the vendor company was

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held, when the liquidator made his report to the shareholders, and that report and his accounts were adopted and approved. Notice of this meeting and the liquidator's accounts were filed with the Registrar of Joint Stock Companies on July 2, 1908, and accordingly, on October 2, 1908, the company became dissolved.

Cave, K.C., and *R. Rowlands*, for the petitioning company. We are entitled to have the 20,000*l.* deposited by the Popular Life Assurance Company paid out to us notwithstanding that that company has never accumulated out of premiums an assurance fund of 40,000*l.* as provided by s. 3 of the Life Assurance Companies Act, 1870. By s. 7 of the Life Assurance Companies Act, 1872, it is laid down that in an amalgamation no policy-holder in the vendor company shall by reason of paying his premiums to the purchasing company be deemed to have abandoned his claim against the vendor company, unless the abandonment has been signified by some writing signed by him. Here the abandonment is clearly proved; the premiums were paid to us on special terms; there are no longer any claims of any kind against the Popular Life Assurance Company, and the company itself has been dissolved and has ceased to exist. The deposit is our money, and nobody else has any claim to it. The dissolution of the company distinguishes this case from *Ex parte Scottish Economic Life Assurance Society* (1), and in that case Kay J. made the order by consent and did not profess to be laying down any general rule. Sect. 3 does not say that the Accountant-General shall not return the deposit unless the 40,000*l.* is accumulated. The case ought not to be followed, for no suggestion was made in it that there was any way of returning the deposit except under the last words of s. 3, whereas the Court can order a return of the deposit under its general jurisdiction: *In re Widnes Ry. Co.* (2); *In re Wool Industries Employers' Insurance Association.* (3) The last words of s. 3 involve the idea that the company is still in existence, so they are clearly not exhaustive and do not apply to a case in which the company has been dissolved. We do not ask

(1) 45 Ch. D. 220.

(2) (1872) L. R. 15 Eq. 108.

(3) [1899] W. N. 259.

for a return of the deposit on the ground of abandonment of their claims by the policy-holders, but as the legal result of the dissolution. It will still form part of our assets after it has been paid out.

Sargant, for the Board of Trade. We do not contend that s. 3 is exhaustive or that the dissolution is irregular, but the Court cannot order a return of this deposit without upsetting a practice which has been in force ever since *Ex parte Scottish Economic Life Assurance Society* (1) was decided. The order made by Parker J. did not affect this point, and the question is still open to the Court. Sect. 3 is imperative, and the Popular Life Assurance Company would not be entitled to receive the deposit out of Court, because they had not accumulated 40,000*l.* as required by the section. They could not give the petitioning company any better right than they had themselves, so, inasmuch as they cannot now accumulate such a fund, the 20,000*l.* must remain in Court as a further security for the policy-holders. Kay J. did not make the order in *Ex parte Scottish Economic Life Assurance Society* (1) on the ground that the petitioners consented to it, but because s. 3 said that the deposit was not to be returned till the fund was accumulated. In *In re Widnes Ry. Co.* (2) and *In re Wool Industries Employers' Insurance Association* (3) the purposes of the company for which the deposit was required had failed altogether, and that is not the case here. There are still policy-holders, and the object of the Act was to make certain that a reserve fund should be kept for their benefit. In a case like this both deposits ought to be kept as reserve funds. Every undertaking ought to rest on its own foundation, but it is now suggested that two undertakings should rest on one foundation. There is no reported case in which payment out of a deposit has been directed before a fund of 40,000*l.* had been accumulated. It may be that if a company had altogether ceased to carry on business it might have some right, in the nature of a resulting trust, to payment out of its deposit, which is really its own property. But this business has merely been transferred, and the dissolution makes no difference. The

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WARRINGTON J. Court may have jurisdiction to make this order, but the petitioners cannot claim it as of right.

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Cave, K.C., in reply.

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WARRINGTON J. stated the facts and proceeded:—Under these circumstances the question is, what is the proper thing to be done? In the first place, the mere payment of the premiums by the policy-holders does not, in accordance with the provisions of the Act of 1872, amount to a release of the liability of the Popular Life Assurance Company, but it seems to me that in this case, no claim having been made in the winding-up by any policy-holder, the winding-up having resulted in the dissolution, and there, therefore, being no such body in existence as the original contracting party, all contracts to which that body was a party must of necessity have come to an end, not merely by the action of the creditors in not making a claim, but by the fact that through no such claim having been made the statutory provision has taken effect and the obligor has ceased to exist. It seems to me, therefore, that, so far as that is concerned, the position of the policy-holders is exactly the same as if they had released the Popular Life Assurance Company from their obligation, and not merely as if the United Provident Assurance Company had made itself liable to them.

That being so, what is the position with regard to this deposit? The deposit was paid in under s. 3 of the Act of 1870. I need not read through every word of the section, but it provides that a company intending to carry on life assurance business in the United Kingdom shall make a deposit of 20,000*l.*, that the Registrar of Joint Stock Companies shall not issue a certificate of incorporation until that deposit has been made, and then it goes on to provide that “the Accountant-General shall return such deposit to the company so soon as its life assurance fund accumulated out of premiums shall have amounted to 40,000*l.*” Now that provision of the section did not come into operation here because the Popular Life Assurance Company did not accumulate out of its premiums a sum of 40,000*l.* The United Provident Assurance Company has made an accumulation out of its premiums exceeding 40,000*l.* But that seems to me quite

irrelevant. In my opinion I have nothing to do with that at all. I have to consider what is the title to this deposit now that all claims against the persons who originally made the deposit have come to an end. It seems to me the result at law must be that the persons who made the deposit, the purposes for which it was made having come entirely to an end, must be entitled to have that deposit paid out under, I do not like to call it a resulting trust—it is not exactly a resulting trust—but under a principle similar to that which regulates the law relating to resulting trusts. That being so, that was a right—a right prospective, subject to the purposes for which the deposit was made—which belonged to the Popular Life Assurance Company. The Popular Life Assurance Company assigned that right with all its other assets to the United Provident Assurance Company, and that right has now passed to the United Provident Assurance Company.

It seems to me in this case (I am saying nothing about the previous cases for the moment) that the United Provident Assurance Company, as the assignees of the old Popular Life Assurance Company now come to an end, are entitled to say “The purposes for which that deposit was made have come to an end, and we, as the assignees of the depositors, are entitled to have it paid out to us.” In my opinion that is the principle upon which Malins V.-C. acted in the case of *In re Widnes Ry. Co.* (1), and the principle on which Byrne J. acted in *In re Wool Industries Employers’ Insurance Association*. (2) That, I think, is the proper view to adopt in this case; but it is said that I cannot properly adopt that view, because by doing so I shall upset a practice which was established eighteen years ago by Kay J. in *Ex parte Scottish Economic Life Assurance Society*. (3) In my opinion, with all respect to the argument which has been addressed to me, I do not find that Kay J. laid down any such practice at all. The facts in that case were quite different to the facts in the present case. The Scottish Economic Life Assurance Society had made a deposit, they had not accumulated 40,000*l.* of premiums, they sold their business to the Scottish Metropolitan Life Assurance Company, and the latter company had

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accumulated more than a 40,000*l.* life assurance fund. The Scottish Economic Life Assurance Society was in course of being wound up, but was not dissolved. The petition there was presented by the Scottish Economic Life Assurance Society and by the Scottish Metropolitan Life Assurance Company, and what Kay J. said in effect was that "The purposes for which the deposit was made have not come to an end, because the company which made the deposit is still under liability to the policy-holders for whose security the deposit was made. I cannot order the money to be paid out to them because, where that is the case, the only circumstance which authorizes me to make the payment, the accumulation of premiums, has not happened, and, therefore, I cannot make the payment to the Scottish Economic Life Assurance Society at the present time"; and then he went on to say, in accordance with a suggestion which had been made to him by counsel in the course of the argument, following a suggestion of his own, that possibly they might be entitled to have the money paid out if the Scottish Metropolitan Life Assurance Company accumulated a further sum of 40,000*l.* out of its own premiums. That is to say the latter company was not strictly in law entitled to get the money, but the Court thought itself at liberty to consider the terms upon which, as an exercise of discretion, it might sanction parting with the deposit, and the learned judge said as at present advised he thought the better course would be to wait until that accumulation had been made.

In the present case I think the United Provident Assurance Company are entitled to have the money paid out, and I do not see that I have any discretion in the matter: the policy-holders are now policy-holders in the United Provident Assurance Company and not in the Popular Life Assurance Company, the purposes for which the deposit was made have come to an end, and I think under those circumstances I am bound to order the transfer. I accordingly do so.

Solicitors: *Lloyd-George, Roberts & Co.*; Solicitor to the Board of Trade.

H. C. R.

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Local Government—New Street—Notice to Frontagers to metal and make good—No Reference to deposited Plan—Sufficiency of Notice, Objection to—When to be taken—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 150, 257, 317; Sched. IV., Form G.

A notice by a local authority under s. 150 of the Public Health Act, 1875, to the frontagers of a new street, not repairable by the inhabitants at large, requiring them to metal and make good the same should substantially follow Form G in Sched. IV. to the Act, and must specifically refer to the deposited plans and sections of the work required to be done and state that such plans and sections are open to their inspection at the office of the local authority.

A notice which merely refers in general terms to the provisions of s. 150 is insufficient and bad.

Frontagers, when served by a local authority with a notice under s. 150 of the Public Health Act, 1875, referring in general terms to the section and requiring them to metal and make good a new street, did nothing. The local authority then executed the required works, and the expenses incurred by them in so doing were apportioned by their surveyor amongst the frontagers in proportion to their respective frontages. The frontagers when served with notice of the apportionment did not dispute it and did not pay the amount of the proportion alleged to be due from them. In proceedings by the local authority under s. 257 of the Act to enforce payment of the alleged proportion:—

Held, that the frontagers were entitled at the hearing to object that the notice under s. 150 was insufficient and bad.

Handsworth District Council v. Derrington, [1897] 2 Ch. 438, 449, distinguished on this point.

ADJOURNED SUMMONS.

The defendants were joint owners of a piece of land fronting a new unnamed street leading out of Norton Road in the district of the plaintiff council. On October 29, 1906, the council passed a resolution declaring that the said street, not being a highway repairable by the inhabitants at large, was not sewered, levelled, metalled, channelled, and made good to their satisfaction, and directed notices addressed to the respective

NEVILLE J. owners or occupiers of the premises fronting, adjoining, or abutting thereon to be given to such owners or occupiers requiring them to sewer, &c., the said street within a time to be specified in such notices. On November 7, 1906, the defendant Butler was duly served with a notice dated the previous 2nd of November and signed by the clerk to the council. This notice (omitting formal parts), after setting out the above resolution, proceeded as follows :—

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“I beg, therefore, to inform you, as an owner of property in such street, that unless the provisions of the 150th section of the Public Health Act, 1875, are complied with within six weeks from the date hereof the council will cause such street to be sewered, levelled, metalled, channelled and made good in such manner as they think fit, and the expense so incurred by them in respect thereof must be repaid to them by the owners of the land adjoining or abutting on the said street, according to the frontage thereto of their respective lands, in such proportions as shall be settled by the surveyor of the said council. The said street, when so sewered, levelled, metalled, channelled, and made good by the council, will be declared by them to be a highway and will thereafter be repairable by the council as such.”

A similar notice was served on the defendant Grove. Prior to such resolution being passed the council had caused a plan and sections of the works they intended to be executed in or upon the said street, together with an estimate of the probable cost thereof, pursuant to s. 150 of the Public Health Act, 1875, to be made, and such plan and sections and the estimate were approved by the council and were, from the date of the passing of the resolution until December 15, 1906, deposited in the office of the surveyor to the council, and were open at all reasonable times to the inspection of all persons interested therein. The defendants did not comply with the notice, and the council proceeded to execute the works themselves and completed them by May 14, 1907, at a cost of 163*l.* 16*s.* On June 11, 1907, the surveyor to the council apportioned this sum between the several frontagers, and the amount apportioned to the defendants in respect of their premises fronting the said street was 76*l.* 8*s.* On June 24, 1907, the council by resolution adopted the apportionment, and on

June 27, 1907, the defendants were served on behalf of the NEVILLE J. council with notice of the apportionment, and this notice, so far as material and omitting formal parts, was as follows:—

“Therefore take notice that I, the undersigned, being the surveyor to the said council, in pursuance of the 150th section of the Public Health Act, 1875, have apportioned and do hereby apportion the sum of 76*l.* 8*s.* as the proportion of the sum of 163*l.* 16*s.* to be paid by you as the owner of the premises fronting, adjoining, or abutting upon the said street, such apportionment being according to the frontage of your said premises. And further take notice that the aforesaid apportionment will be binding and conclusive upon you unless, within three months from the date of the service of this notice upon you, you shall by written notice to the said council dispute the same.”

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The defendants did not dispute the apportionment, and on November 7 they were served on behalf of the council with the usual demand for payment, but they informed the council that they would not pay on the ground that they were not liable. In December the council passed a resolution authorizing their clerk to take proceedings to recover from the frontagers the expenses due under s. 150 of the Act, and on March 25, 1908, this action was commenced by originating summons under s. 257 of the Act, whereby the council claimed (1.) a declaration that the 76*l.* 8*s.* with interest thereon at 5*l.* per cent. from November 10, 1907, was a charge upon the defendants' land fronting the said street; (2.) an account of what was due for principal, interest, and costs; and (3.) that in default of payment of the amount found to be due the charge might be enforced by foreclosure or sale.

R. C. Glen, for the summons. The statutory procedure has been followed. It is for the defendants to shew that they are not liable.

S. G. Lushington, for the defendants. The notice of November 2, 1906, was insufficient. The notice is the necessary foundation of all legal proceedings under the Act, and it is a condition precedent to all liability on the part of frontagers that the notice should comply with the requirements of the Act. This notice is

NEVILLE J. bad, first, because it does not substantially follow Form G in Sched. IV. to the Act, which is the statutory form of notice under s. 150 and by virtue of s. 317 takes effect as part of the Act, and, secondly, because it does not sufficiently point out the works the frontagers are required to do. (1) It does not give

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(1) The Public Health Act, 1875, enacts:—

Sect. 150: "Where any street within any urban district (not being a highway repairable by the inhabitants at large) or the carriageway footway or any other part of such street is not sewered levelled paved metalled flagged channelled and made good or is not lighted to the satisfaction of the urban authority, such authority may, by notice addressed to the respective owners or occupiers of the premises fronting adjoining or abutting on such parts thereof as may require to be sewered levelled paved metalled flagged or channelled, or to be lighted, require them to sewer level pave metal flag channel or make good or to provide proper means for lighting the same within a time to be specified in such notice.

"Before giving such notice the urban authority shall cause plans and sections of any structural works intended to be executed under this section, and an estimate of the probable cost thereof, to be made under the direction of their surveyor, such plans and sections to be on a scale of not less than one inch for eighty-eight feet for a horizontal plan and on a scale of not less than one inch for ten feet for a vertical section, and, in a case of a sewer, showing the depth of such sewer below the surface of the ground: such plans sections and estimate shall be deposited in the office of the urban authority, and shall be open at all reasonable hours for the inspection

of all persons interested therein during the time specified in such notice; and a reference to such plans and sections in such notice shall be sufficient without requiring any copy of such plans and sections to be annexed to such notice.

"If such notice is not complied with, the urban authority may, if they think fit, execute the works mentioned or referred to therein; and may recover in a summary manner the expenses incurred by them in so doing from the owners in default, according to the frontage of their respective premises, and in such proportion as is settled by the surveyor of the urban authority, or (in case of dispute) by arbitration in manner provided by this Act"

Sect. 257: "Where any local authority have incurred expenses for the repayment whereof the owner of the premises for or in respect of which the same are incurred is made liable under this Act such expenses may be recovered, together with interest at a rate not exceeding five pounds per cent. per annum, from the date of service of a demand for the same until payment thereof, from any person who is the owner of such premises when the works are completed for which such expenses have been incurred, and until recovery of such expense and interest the same shall be a charge on the premises in respect of which they were incurred"

"Where such expenses have been settled and apportioned by the surveyor of the local authority as payable

details of the works required to be done, nor does it refer to the NEVILLE J. plan and sections that have been prepared, nor does it inform the party served that such plan and sections are at the office of the council and are open to his inspection at all reasonable times: *Parkinson v. Blackburn Corporation* (1); *Bayley v. Wilkinson* (2); *Acton Local Board v. Lewsey*. (3) The defendants, therefore, are not liable, and the objection to the validity of the notice can be taken now. It is not a case within s. 257, because there has been no dispute as to the amount of the apportionment and no reference to arbitration under s. 150: *Bayley v. Wilkinson*. (2)

R. C. Glen, in reply. The notice is sufficient because it calls the attention of the party served to the provisions of s. 150 and puts him on inquiry, and if he looked at the section he would see that plans and sections and an estimate were deposited at the office of the council, which were open to his inspection at all reasonable times, and which would give him full details of the works required to be done and the probable cost of them. The provision in the section as to plans and sections is purely directory, not imperative; the section does not expressly say that the notice shall refer to the deposited plans and sections: *Cook v.*

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by such owner, such apportionment shall be binding and conclusive on such owner, unless within three months from service of notice on him by the local authority or their surveyor of the amount settled by the surveyor to be due from such owner, he shall by written notice dispute the same"

Sect. 317: "The schedule to this Act shall be read and have effect as part of this Act.

"The forms contained in Schedule IV. to this Act, or forms to the like effect, varied as circumstances may require, may be used and shall be sufficient for all purposes."

Form G in Sched. IV. is a form of notice under s. 150 to a frontager, and, after giving him notice in the language of the section to sewer,

level, &c., the street within a certain time, proceeds to give particulars of the works required to be done as shewn on the plans and sections prepared by the surveyor of the local authority, and concludes: "The whole of the above-mentioned works to be executed by you in accordance with the plans and sections hereinbefore referred to, and now lying for inspection by you at the office of the [local authority] situate in street in aforesaid, and the dimensions, widths, and levels shown thereon and to be done in a good, workmanlike and substantial manner, to the satisfaction of the said [local authority] or their surveyor."

(1) (1859) 33 L. T. (O.S.) 119.

(2) (1864) 16 C. B. (N.S.) 161.

(3) (1886) 11 App. Cas. 93, 95.

NEVILLE J. *Ipswich Local Board* (1); *Shanklin Local Board v. Millar*. (2)
 1908 But even if the notice ought to have referred to the deposited
 STOUR- plans and sections, the defendants are estopped from now
 BRIDGE objecting to the validity of the notice or of the apportionment.
 URBAN They ought to have disputed the apportionment within the three
 COUNCIL months from June 27, 1907, the date when notice of the appor-
 v. tionment was served upon them, and raised all their objections
 BUTLER AND upon the arbitration: *Handsworth District Council v. Derrington* (3); *Walthamstow Local Board v. Staines* (4); or they could
 GROVE. have appealed against the apportionment to quarter sessions or
 to the Local Government Board and taken the objection then:
Sandgate Local Board v. Keene (5); *Reg. v. Local Government Board* (6); *Folkestone Corporation v. Brooks*. (7)

NEVILLE J. The point upon which it appears to me that the claim of the plaintiffs fails is this, that the notice given by the urban authority, purporting to be a notice under s. 150 of the Public Health Act, 1875, was insufficient. Now to consider that point in detail. Sect. 150 provides that where a local authority are dissatisfied with the way in which a street, not being a highway repairable by the inhabitants at large, is sewered, levelled, paved, metalled, flagged, channelled, and made good, or is not lighted, they may "by notice addressed to the respective owners or occupiers of the premises fronting adjoining or abutting on such parts thereof as may require to be sewered levelled paved metalled flagged or channelled, or to be lighted, require them to sewer level pave metal flag channel or make good or to provide proper means for lighting the same within a time to be specified in such notice." Then the section goes on to say that "Before giving such notice the urban authority shall cause plans and sections of any structural works intended to be executed under this section, and an estimate of the probable cost thereof, to be made under the direction of their surveyor, such plans and sections to be on a scale of not

(1) (1871) L. R. 6 Q. B. 451, 460.

(4) [1891] 2 Ch. 606.

(2) (1880) 5 C. P. D. 272, 277.

(5) [1892] 1 Q. B. 831, 835.

(3) [1897] 2 Ch. 438, 449.

(6) (1882) 10 Q. B. D. 309.

(7) [1893] 3 Ch. 22, 31.

less than one inch for eighty-eight feet for a horizontal plan, and on a scale not less than one inch for ten feet for a vertical section, and, in the case of a sewer, showing the depth of such sewer below the surface of the ground: such plans sections and estimate shall be deposited in the office of the urban authority, and shall be open at all reasonable hours for the inspection of the frontagers. I call them "frontagers" because they are the persons who are liable under the earlier part of the section. Then, in case the notice is not complied with, the urban authority have the right to do the works themselves, to ascertain the amount of the proportion payable by each of the frontagers in respect of the works done, and summarily to recover the amount so found to be due, with a provision for arbitration in case there is a dispute as to the apportionment that has been made. I pass rapidly over this part of the provisions of the Act because it does not seem to me that it seriously affects the question which I have to decide here. Then s. 317 provides: "The schedules to this Act shall be read and have effect as part of this Act. The forms contained in Schedule IV. to this Act, or forms to the like effect, varied as circumstances may require, may be used and shall be sufficient for all purposes." That obviously does not confine the urban authority in any way to the precise form of the notice, but I think that it is of assistance in shewing what is the kind of notice, and the extent of the notice, which is required under s. 150; and when you turn to the Form G, with reference to this particular matter, you find that precise details are given in respect of the works which the local authority require to be done, and that direct reference is made to the plans and sections deposited at the office of the local authority. Now, that being so, the question is whether the notice which has been given in the present case by the local authority is sufficient. It is properly signed by the clerk, and I will only deal with the operative part of it, which is as follows: "I beg, therefore, to inform you, as an owner of the property in such street"—the street referred to being the new unnamed street off Norton Road—"that unless the provisions of the 150th section of the Public Health Act, 1875, are complied with within six weeks from the date hereof the said council will cause such street to

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NEVILLE J. be sewerred, levelled, metalled, channelled and made good in such manner as they think fit, and the expense so incurred by them in respect thereof must be repaid to them by the owners of the land adjoining or abutting on the said street, according to the frontage thereto of their respective lands, and in such proportion as shall be settled by the surveyor of the said council." Now it is to be observed that, although plans and sections were duly prepared and deposited, there is no reference to the existence of any such plans and sections; and on turning once more to s. 150 one finds a provision that "A reference to such plans and sections in such notice shall be sufficient without requiring any copy of such plans and sections to be annexed to such notice." That, of course, raises the question whether, where plans and sections are prepared by the local authority indicating the precise character of the works which they require to be done, a notice which is silent as to the existence of such plans and sections would be a good and sufficient notice of what was required to be done in the absence of such specific and precise details of the works required as would give information practically identical with what would be obtained if the plans and sections had been inspected. It seems to me that the wording of the section precludes the idea that a notice of works, the character of which, so to speak, depends upon the plans and sections which have been deposited, would be good without a reference to those plans and sections. I think the intimation in the section that a reference to the plans and sections will do, without requiring a copy of them to be annexed to the notice, indicates that in one way or another the person who receives the notice is to obtain the information of what is contained in the plans and sections. But it is argued that in a notice which in terms refers to s. 150 of the Public Health Act, 1875, the particulars of the works required to be done are not necessary, because any person who, after receiving the notice, in obedience to the notice referred to the section and read it carefully would find that plans and sections shewing the details of the works had to be deposited, and also that he was entitled to inspect them, so that the information necessary for him to judge of the character of the works which he had to perform might be obtained by a reference

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to the section and an understanding of the provisions that the section laid down. Now that raises a question of some general importance, that is to say, whether a notice in no sense in the form set out in Sched. IV., and in no way giving particulars of the works required to be done, is good under s. 150 so long as it refers to the section itself, and by so doing puts the person who is served upon an inquiry that might and probably would lead in the end to his obtaining the required information. In my opinion it is impossible to hold that such a notice is sufficient. I think that it would be exceedingly unfair upon members of the public receiving such a notice so to read the provisions of the Public Health Act, 1875. I think that local authorities giving notice under s. 150 are bound to give sufficient particulars to the persons, the frontagers, on whom they serve the notice of the works they are required to do, and that it is not enough for them to say "If you refer to s. 150 you will find out what you are required to do under that section." I hold, therefore, that in the present case the notice was insufficient and bad.

The only remaining question is whether the insufficiency of the notice can be raised as a defence to a proceeding under s. 257 of the Act for the recovery of the proportion which has been apportioned by the surveyor against the respondents to the summons now before me. As I read the authorities, none of them are at all inconsistent with the view that I take upon the matter. It is true that Kekewich J. in the case of *Handsworth District Council v. Derrington* (1) decided that where there had been a reference to arbitration the frontager was bound to raise all the points that he relied upon at the arbitration and could not be allowed to raise questions as to the validity of the transaction at a later period. But here there has been no reference to arbitration at all, and I do not think that decision of Kekewich J. is an authority on the point now before me. In this case all that the frontagers have done has been to remain quiescent until proceedings were taken against them, and in such a case I think they are entitled to raise any points of defence which occur to them, and, amongst other defences, I think they are entitled to raise the question

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(1) [1897] 2 Ch. 438, 449.

NEVILLE J. whether the notice served upon them under s. 150 was sufficient or not, and for this reason, that if the notice was insufficient it is just the same as if no notice had ever been served at all. All the rights of the local authority are subsequent to and dependent upon the serving of a valid notice. If a valid notice has not been served, the relations between the frontagers and the local authority are never constituted at all, and consequently the frontagers have a perfect right, if they choose, to wait and see what steps the local authority will take against them, and to say, when it is sought to recover the money from them, "You cannot do so. You served no notice within the provisions of the Act upon us, and consequently the right to complete the works and recover the proportion of the expenses from us never arose, and your application must fail." I think, therefore, these summonses must be dismissed with costs.

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Solicitors: *Smiles & Co., for W. W. Goddard, Stourbridge;*
Dennison, Horne & Co., for E. H. Grove, Halesowen.

H. L. F.

NEVILLE J.

In re RAPID ROAD TRANSIT COMPANY.

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[00134 of 1906.]

Solicitor — Lien on Documents — Winding up — Liquidator — Documents in Solicitor's hands before Winding-up Order.

An action was brought by a company against its directors for penalties for acting without qualification. N. acted as solicitor for the company, and documents came into his hands in the course of the action. The company was ordered to be wound up compulsorily and a liquidator was appointed. The liquidator continued the action and retained N., but afterwards discharged him and appointed another solicitor, to whom he required N. to hand over all documents relating to the action. N. claimed a lien for costs. This summons was taken out by the liquidator for an order for the delivery of documents:—

Held, that N. had a good lien on, and was entitled to retain until his costs were paid, all documents which had come into his possession, and on which he had acquired a lien before the order for winding up, but must deliver those acquired in the course of the winding-up.

On April 5, 1906, an action was commenced by the Rapid Road Transit Company against three of its directors for a

declaration that they had ceased to be directors of the company NEVILLE J. on January 29, 1906, by reason of their not having obtained their 1908 qualification, an injunction to restrain their acting as directors, and penalties for their having acted since that date. The respondent J. Neely was the solicitor for the company in this action. On May 11, 1906, an injunction was granted. On July 25, 1906, a compulsory winding-up order was made against the company, and the official receiver was appointed liquidator. He continued the action, and on June 19, 1907, retained Neely as his solicitor therein. On February 20, 1908, the official receiver discharged Neely, appointed another solicitor, and required Neely to hand over the papers. Neely claimed a lien and refused to hand over his papers until his costs were paid. The official receiver then took out this summons against Neely, asking for the delivery up of all documents which had come into his possession in connection with such action subject to his lien (if any).

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W. H. Cozens-Hardy, for the summons. A solicitor's lien is only available as against his client and persons claiming through him; it does not enable him to refuse production to any one to whom his client was bound to produce the documents: *Furlong v. Howard*. (1) Creditors of a company are in the position of third parties, and it has always been held that in representative actions, such as administration actions, the lien cannot be set up against other parties to the action: *In re Hawkes*. (2) Creditors in an administration action are in the position of third parties. *Colegrave v. Manley* (3) shews that a solicitor cannot even as against his own clients refuse to produce papers in an action where he has discharged himself. The distinction between a solicitor discharging himself and being discharged is stated by Rigby L.J. in *In re Hawkes* (4) to be a question of procedure, and it cannot affect third parties. The rule is not confined to administration. It applies to a winding-up—*In re South Essex Estuary and Reclamation Co.* (5); *In re Capital Fire Insurance*

(1) (1804) 2 Sch. & Lef. 115.

(3) (1823) T. & R. 400.

(2) [1898] 2 Ch. 1.

(4) [1898] 2 Ch. 20.

(5) (1869) L. R. 4 Ch. 215.

NEVILLE J. *Association* (1); *Batten v. Wedgwood Coal and Iron Co.* (2)—and to a partition action: *Boden v. Hensby.* (3) The rule established by these cases and by *Belaney v. French* (4), *In re Boughton* (5), and *Hutchinson v. Norwood* (6) is that a solicitor who acts for a party in an action cannot acquire any lien upon documents as against third parties who are interested in the action.

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[NEVILLE J. referred to *Griffiths v. Griffiths* (7) and to *Christian v. Field.* (8)]

In *Christian v. Field* (8) the solicitor was a stranger to the suit, and *Griffiths v. Griffiths* (7) can be distinguished on the ground that no rights of third parties intervened.

R. Nevill, for the solicitor. Most of the cases cited deal with the question of production, but the summons asks not for production, but delivery.

[NEVILLE J. I think it is settled practice that if a party is entitled to production he is entitled to an order in the form asked for.]

The general principle is that a discharged solicitor is under no obligation to deliver up or even produce papers on which he has a lien. Vaughan Williams L.J. in *In re Hawkes* (9) so states the rule as established by *In re Faithfull* (10), and it makes no difference that the client who discharges him is a liquidator. That is clearly established by the judgments of the Court of Appeal in *In re Capital Fire Insurance Association.* (1) The solicitor had a good lien at the commencement of the winding-up, and there has been nothing to take it away. It has never been suggested that the decision in *In re Hawkes* (9) is wrong, but, if not, it shews that the analogy of an administration action does not apply. The applicant's argument must be that there can be no lien against a solicitor, but *In re Anglo-Moravian Hungarian Junction Ry. Co.* (11) clearly shews that there may be such a lien. *Ex parte Yalden* (12) shews that the lien can be enforced against a trustee in bankruptcy, and a liquidator is in the same

(1) (1883) 24 Ch. D. 408.

(2) (1884) 28 Ch. D. 317.

(3) [1892] 1 Ch. 101.

(4) (1873) L. R. 8 Ch. 918.

(5) (1883) 23 Ch. D. 169.

(6) (1886) 54 L. T. 842.

(7) (1843) 2 Hare, 587, 592.

(8) (1842) 2 Hare, 177.

(9) [1898] 2 Ch. 1, 24.

(10) (1868) L. R. 6 Eq. 325.

(11) (1875) 1 Ch. D. 130.

(12) (1876) 4 Ch. D. 129.

position. In this case all the papers came into the solicitor's NEVILLE J. hands before the date of the winding-up. The costs for which 1908 the lien is claimed are costs in the action, not in the winding-up.

Cozens-Hardy in reply.

Cur. adv. vult.

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NOV. 3. NEVILLE J. A solicitor's lien over documents of his client upon which he has spent skill and labour is of course a legal right, being one branch of a wider law.

It cannot be set up against the right to production upon subpœna duces tecum, or where ordered in an action before trial, except on the demand of the client against whom the lien is claimed or those claiming under him. A solicitor conducting litigation for a client has a lien upon the papers in the cause if he be discharged by the client, secus if he discharge himself.

The above propositions are, I think, established by *Furlong v. Howard* (1), *Lord v. Wormleighton* (2), *Colegrave v. Manley* (3), *Griffiths v. Griffiths* (4), *In re Cameron's Coalbrook Ry. Co.* (5), *Vale v. Oppert* (6), and other cases, and are, I think, in accordance with legal principle.

The decisions limiting the efficacy of the solicitor's lien do not, however, stop there, some of them having gone so far as to lead to the following remarks by Pearson J. in *Batten v. Wedgwood Coal and Iron Co.* (7): "I do not intend to create again a lien which seems to have been abolished by common sense and the practice of the Court." I respectfully demur to the invocation of common sense in this connection, but the practice of the Court does appear to have made serious inroads upon the legal right of solicitors in some cases.

In *Ross v. Laughton* (8) it was held by Lord Eldon that a solicitor was bound to produce the papers of his client for him, or in case of his bankruptcy for his assignees, in the cause for the purpose which he received them, while in *Lord v. Wormleighton* (2) he held, in a creditor's action for administration, that a solicitor

(1) 2 Sch. & Lef. 115.

(2) (1822) Jac. 580.

(3) T. & R. 400.

(4) 2 Hare, 587, 592.

(5) (1857) 25 Beav. 1.

(6) (1875) L. R. 10 Ch. 340.

(7) 28 Ch. D. 320.

(8) (1813) 1 V. & B 349.

NEVILLE J. is not bound to produce the papers in his possession for the purposes of the cause at the instance of the executors of his client who have discharged him, his bill of costs not being paid. This was a considered decision given after consultation with the Master of the Rolls and the Vice-Chancellor.

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If *Ross v. Laughton* (1) was decided with regard to papers come to the hands of the solicitor under similar circumstances to those in *Lord v. Wormleighton* (2), then I think it cannot be reconciled with the later decision, the difference between an assignee and executor relied upon by Selwyn L.J. in *Simmonds v. Great Eastern Ry. Co.* (3) as a ground for distinguishing the two cases not being maintainable in the face of the decisions that a trustee in bankruptcy has no higher right in this regard than the bankrupt: see *Ex parte Yalden* (4) and *In re Anglo-Moravian Hungarian Junction Ry. Co.* (5); *In re Moss*. (6) In *In re Moss* (6) Lord Romilly held that the bankruptcy of the client in an action was equivalent to the discharge of the solicitor and entitled him to a lien on the documents in the suit against the trustee in bankruptcy. In *In re Anglo-Moravian Hungarian Junction Ry. Co.* (5) James L.J. stated that upon a change of solicitors in a liquidation the solicitor still retained the right to keep the papers on which he had a lien, and in *Ex parte Yalden* (4) it was held that the solicitor of a trustee in bankruptcy could insist on his lien against a newly appointed trustee who employed another solicitor. The preponderance of opinion seems to me in favour of the proposition that neither a client who has discharged his solicitor in a suit nor those claiming under him can obtain production.

In *Belaney v. French* (7) James L.J. held that certain estate plans in the hands of former solicitors to the parties must be delivered to the receiver in the cause who required them for the purposes of the estate. No cases bearing on solicitors' lien were cited, but James L.J. said: "A solicitor cannot embarrass a suit by keeping papers which belong to an estate which is being

(1) 1 V. & B. 349.

(2) Jac. 580.

(3) (1868) L. R. 3 Ch. 797.

(4) 4 Ch. D. 129.

(5) 1 Ch. D. 130.

(6) (1866) L. R. 2 Eq. 345.

(7) L. R. 8 Ch. 918, 920.

administered by the Court and cannot use that means of obtaining payment. There is no foundation to such a claim to lien and it cannot be allowed." The words "embarrass a suit" have been relied upon and extended in later cases to actions other than administration actions, for instance by North J., in *Boden v. Hensby* (1), to an action for partition. A receiver is the officer of the Court representing all the parties to the suit, and since some of them must have a right to production, *Belaney v. French* (2) may be explained on that ground. Again, in the case of a partition action all the parties interested are not in the first instance before the Court, and the plaintiff's solicitor may be under the same obligation to produce as he would have been if they had all been defendants and demanded production.

This explanation will not, however, cover *Boden v. Hensby* (1), inasmuch as it was the plaintiff who demanded delivery from his own solicitor, whom he had discharged, and, moreover, production was not ordered in respect of documents over which he had a lien before action, which, as is pointed out by Lindley L.J. in *In re Hawkes* (3), he would have been bound to produce at the instance of another party to the action. In *In re Hawkes* (3) a solicitor was ordered to produce to a party to the action documents which the other parties, against whom the solicitor was entitled to a lien, would themselves have been bound to produce. It will be seen that this case is within the principles previously stated. The only obscurity in this case is the introduction of the words "embarrass proceedings," which indicate a reference to the rule in *Belaney v. French* (2), but which do not appear to me to be necessary to the decision. In truth, I cannot bring the cases which have been decided, professedly, on the ground that the solicitor must not embarrass the action by insisting on his lien against his client within the ambit of any principle. The maintenance of a solicitor's lien seems to me important not only to the solicitor, but to those who employ him: see Lord Romilly's judgment in *In re Moss*. (4) Why a client who has discharged a solicitor for no fault of his own, or any one claiming through and having no higher title than the client, should be entitled to take

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(1) [1892] 1 Ch. 101.

(2) L. R. 8 Ch. 918.

(3) [1898] 2 Ch 1, 11.

(4) L. R. 2 Eq. 347.

NEVILLE J. advantage of the skill and labour which the solicitor has already
 1908 expended without payment I do not understand. Other parties
 RAPID ROAD to the suit are already protected by the doctrine that the right
 TRANSIT of the solicitor to refuse production on the ground of lien is no
 COMPANY, higher than that of the client. It appears to me that the limita-
 In re. tion of the solicitor's legal right in the cases which do not come
 within any of the principles I have referred to must be based
 upon some arbitrary and, to my mind, ill-defined rule, and I
 think, therefore, that I must not extend its application beyond
 the limits of the particular decisions by which I am bound.

It must be remembered that James L.J. was a party to the
 judgment in *In re Anglo-Moravian Hungarian Junction Ry.*
Co. (1) and *Ex parte Yalden* (2), as well as to *Belaney v.*
french. (3)

Delivery of the papers in an action is demanded in the present
 case. That action is by a company against its directors, and is
 clearly not a representative action. The solicitor did not dis-
 charge himself, and was at the date of the liquidation clearly
 entitled to a lien upon the documents in the suit. *In re*
Capital Fire Insurance Association (4) is an authority to shew
 that a winding-up order cannot defeat any valid lien existing at
 the time when the winding-up petition was presented. The suit
 was, however, further prosecuted under the direction of the
 official receiver in the winding-up, and I think the same autho-
 rity shews that no available lien has been acquired against the
 liquidator in respect of documents come to his hands pending
 the winding-up. I think that such documents, if any such there
 be, must be delivered up, but with regard to the documents in
 the suit in his hands at the commencement of the winding-up
 I think the application fails. There will be an order for delivery
 up of any documents come to the solicitor's hands pending the
 liquidation, subject to the lien of the solicitor, if any. The
 liquidator must pay the costs of the summons, taking them
 together with his own costs out of the assets.

Solicitors: *Munns & Longden; John Neely.*

(1) 1 Ch. D. 130.

(3) L. R. 8 Ch. 918.

(2) 4 Ch. D. 129.

(4) 24 Ch. D. 408.

In re DUNSTER.
BROWN *v.* HEYWOOD.

[1908 D. 115.]

NEVILLE J.

1908

Nov. 5.

Will—Construction—Class Gift—Revocation by Codicil—Intestacy.

D. by his will directed his trustees to divide his residuary estate into as many equal shares as he should have daughters who should survive him, or should have died in his lifetime leaving issue him surviving, and to appropriate one such share to each such daughter. He then directed each daughter's share to be settled on herself and her children. By a codicil he revoked the gift of a share to his daughter L. All his daughters, including L., survived him:—

Held, that the gift was to a class, and therefore there was no lapse as to the revoked share, but the residue was divisible among the daughters other than L. in equal shares.

Ramsay v. Shelmerdine, (1865) L. R. 1 Eq. 129, not followed.

THOMAS MAY DUNSTER by his will dated July 1, 1899, after giving specific and pecuniary legacies, proceeded: "I devise and bequeath all the residue of my property of what nature or kind soever unto my trustees upon trust that they shall at such time and manner as they shall think fit sell and convert the same and hold the proceeds of sale together with any ready money upon trust after payment of my funeral and testamentary expenses and debts and the legacies hereinbefore bequeathed to invest the same in or upon stocks funds or securities hereinafter authorized and to divide the said trust premises into as many equal shares as I shall have daughters who shall survive me or shall have died in my lifetime leaving issue surviving me and shall appropriate one of such shares to each such daughter who shall survive me or shall have died leaving issue as aforesaid (and so that any reference hereinafter contained to the shares of my said respective daughters in the trust premises shall be deemed to apply to the shares hereinbefore directed to be appropriated to them respectively whether they shall respectively survive me or not)." The testator then provided for the settlement of his daughters' shares and proceeded: "Provided always that in the event of the failure or determination of the trusts

NEVILLE J. herainbefore declared and contained concerning any share of a daughter of mine in the said trust premises I declare that such share and any additional share or shares which may accrue or be added thereto by virtue of this present proviso and the income thereof respectively shall go and accrue by way of addition to the share or shares of my other daughters or daughter in the said trust premises if more than one in equal shares and proportions and so that the share which shall so accrue and be added to the share of any daughter of mine shall be held upon the trusts and subject to the powers and provisions herein declared and contained concerning her original share or as near thereto as circumstances will admit."

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The testator made a second codicil, dated April 20, 1891, to his will, which contained the following clause: "I revoke the bequest of 11,000*l.* given by the first codicil to my said will to and for the benefit of my daughter Lucy Annesley and I also revoke all shares in my residuary estate which by my will I have given to and for the benefit of my daughter Lucy Annesley and I give the said sum of 11,000*l.* unto and to be equally divided between my five daughters Elizabeth Hopwood Emily Hepburn Alice Dunster Catherine Lucretia Lowder and Annie May Smith."

The testator died on January 24, 1907, having made several other codicils to his will, none of which contained any specific disposition of the share revoked by the second codicil.

The testator had six daughters, including Lucy Annesley, all of whom survived him.

The trustees of the will took out this originating summons for the determination of the question, among others, "whether the testator had died intestate as to the share of residue directed to be appropriated as the share of Lucy Annesley, or whether his residuary estate was divisible into five shares for the benefit of his other five surviving daughters."

Chubb, for the trustees.

Butcher, K.C., and *Betterton*, for one of the next of kin. There is an intestacy as to the share of residue revoked by the codicil. In *Shaw v. M'Mahon* (1) Lord St. Leonards held that the

revocation of a share did not cause an intestacy, but in that case the gift was a direct class gift to the children; there was no direction to divide the residue into a certain number of shares. In *Ramsay v. Shelmerdine* (1) there was a direction to divide into as many shares as the testator should have children living at his death, followed by a gift of a share to each child. The words cannot be distinguished from those in this case, and Stuart V.-C. held that it was a gift to each child individually, not to a class, and therefore there was an intestacy as to a share which was revoked. That case has never been disputed. It is quoted without disapproval in the text-books and was referred to as an existing authority by Buckley J. in *In re Whitehorne*. (2)

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Bramwell Davis, K.C., and *Sargant*, for Lucy Annesley (who as one of the testator's next of kin was interested in a lapse), argued on the same side.

Peterson, K.C., and *Austen-Cartmell*, for some of the testator's daughters. *Ramsay v. Shelmerdine* (1) lays down no principle of construction, and is not binding on this Court in construing a different will. Even if the gift of the revoked share lapsed, it is restored by the accruer clause.

Jenkins, K.C., and *Mossop*, for other daughters. *Ramsay v. Shelmerdine* (1) is distinguishable because there the class to whom the gift is made does not square with the dividing factor by which the number of shares is fixed. The fund was to be divided into as many shares as the testator left children surviving, but the gift excluded sons who survive the testator but die under twenty-five. The two classes are not the same. Here there is no such difficulty.

R. Whitehead, for parties in the same interest.

Butcher, K.C., in reply.

NEVILLE J. I have felt considerable difficulty over this question, owing to the state of the authorities. The question that I have to decide arises under these circumstances: There is a well-known rule that where residue is given to tenants in common, and one of the tenants in common dies in the testator's lifetime, the lapsed share does not go as an accretion to the gift

(1) L. R. 1 Eq. 129.

(2) [1906] 2 Ch. 121.

NEVILLE J. to the other tenants in common, but it is held that there is
1908 an intestacy and the share goes amongst the next of kin. That
DUNSTER, is, there can be no residue of a residue. The arguments by
In re. which this rule was arrived at are perfectly intelligible and,
BROWN one may say, plausible. Nevertheless I think that the effect
r. of it is to defeat the testator's intention in almost every
HEYWOOD. case in which it is applied; but it is a rule by which I am
undoubtedly bound. That rule has been held to apply in cases
where the gift is to named persons, but not to apply in cases
where the gift is to a class, and I think the reason is obvious,
because the difficulty which led to the application of the rule
in the case of a gift to designated persons does not apply where
the gift is to a class. In that case the death of one of the pre-
sumptive members of the class simply leads to the contraction of
the class, and therefore what that individual would have taken is
automatically absorbed and goes into the general fund, which
becomes divisible amongst the reduced number. I think there
is no doubt that a revocation in the case of one person who is a
presumptive member of the class to which the gift is made has
the effect of excluding that member from the class, but not that
of preventing the gift from being what it was in the inception,
a gift to a class.

In the present case we have words used of some peculiarity,
and the peculiarity arises, I think, partly from the elaboration
which has been used to give effect to a usual and perfectly well-
known method of disposal of residue—that is, to children who
survive the testator, and to the issue of children who die in the
testator's lifetime leaving issue, as tenants in common in equal
shares per stirpes and not per capita—and partly also to the
desire of the testator to settle the shares which he gave to his
daughters. Instead of dealing with the residue quite in the
usual way, the testator has specifically declared exactly what
the trustees are to do to carry out his intention, the intention
being, when one investigates the words, precisely the same as
the intentions expressed in a gift such as that to which I have
referred. He gives by a general description to his daughters
“who shall survive me or shall die in my lifetime,” but he does not
do this by a direct gift to the daughters. He directs his trustees

to divide his residue into as many equal shares as he shall have daughters who shall survive him, or shall die in his lifetime leaving issue. He is there, it seems to me, directing the trustees to do exactly what they would have to do if he had left it to these persons as tenants in common. But here another peculiarity arises—that, inasmuch as he has settled the daughters' shares, he does not make a gift to the issue of the daughters, but he declares that the shares shall be appropriated to the daughters, including those who have died leaving issue, although, of course, they could not personally take, because, *ex hypothesi*, they would have been dead at the time the will came into operation. But the intention which I find in the will is carried into effect by the form of the settlement of the daughters' shares, which gives a life interest to the daughter with remainder to the children, and consequently it seems to me that the words in the will are exactly equivalent to a perfectly well-known form of words, with regard to which there can be no question, but that the gift is a gift to a class, and not a gift to designated individuals.

In the case of *Shaw v. M'Mahon* (1) the testator gave a fund to be divided in equal parts amongst all his children living at his death. That has been held to be a gift to a class, and it could not have been held, I think, otherwise. Now, would it have made any difference in that case, supposing the testator had directed the fund to be divided into as many parts as there should be children living at his death and one part appropriated to each child? It seems to me that it is inconceivable that there should be any difference, and though the words in the present case are not by any means identical with the words in the case of *Shaw v. M'Mahon* (1), inasmuch as the settlement of the shares in favour of the daughters and their children results in a modification of the terms used, it seems to me the intention expressed by the direction to the trustees is really precisely the same. I think that the ground upon which it has been held that there is no residue of a residue is a ground that does not apply here, because the residue has never to be divided into more shares than there are children to take it, and, consequently, really the question of what is to be done with the share of a daughter

(1) 4 D. & War. 431.

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NEVILLE J. who dies in the lifetime of the testator without issue, or in the case of a daughter whose interest under the will is revoked, never arises, because she never has, and never can have, a share, and the words used are amply sufficient to provide for the division of the whole of the fund amongst those who are left to enjoy it under the gift to the daughters "who shall survive me or who shall have died in my lifetime leaving issue"; and therefore it seems to me that, if I were to hold that the principle in *Sykes v. Sykes* (1) and cases of that nature were to apply to the present case, I should be applying a rule based upon particular reasoning to a case in which that reasoning does not apply at all, and I think in so doing I should not be justified. So far I confess, if the matter is free from authority, I should be free from doubt; but a case has been cited to me of *Ramsay v. Shelmerdine* (2), in which the words used bear a strong similarity to the words used in the present will, and it is said that, notwithstanding my own opinion, I ought to follow this decision, because it is of considerable standing. I think myself that I ought not to take that course, and for this reason: I do not think *Ramsay v. Shelmerdine* (2) purports to lay down any rule of construction at all; it simply turns upon the construction which the learned judge put upon the particular will before him at the time; although I may say, with great respect, that I doubt if I should have come to the same conclusion as the learned judge.

It may be that, as Mr. Jenkins pointed out, there is sufficient ground for distinguishing *Ramsay v. Shelmerdine* (2) from the present case, and I should be glad to think that that was so, because I need hardly say that I should have great hesitation in appearing to throw any doubt upon the validity of the decision which Stuart V.-C. arrived at many years ago; but I do not think that I have to express any opinion on it. That was a decision upon a particular will which, for all I know, may be correct, but I think I ought to be guided by my own opinion with regard to this will, notwithstanding that another judge, on a somewhat similar will, has come to a conclusion which looks on the face of it as if it might be applied to the present will.

It has been argued that the accruer clause which follows the

(1) (1867) L. R. 4 Eq. 200; (1868) 3 Ch. 301. (2) L. R. 1 Eq. 129.

gift on which I have expressed an opinion is sufficient to bring NEVILLE J. in the share given in trust for Mrs. Annesley which was revoked 1908 by one of the testator's codicils, and that therefore the question DUNSTER, whether the gift was a gift to individuals does not arise. That In re. may be so. I see certain difficulties in the way of the argument BROWN v. which I do not say are insuperable, but, having come to the conclusion that the gift was to a class, it is unnecessary for me HEYWOOD. to decide on the construction of the accruer clause. I am of opinion that the revocation in the codicil was equivalent to the exclusion of the daughter named from the class in whose favour the gift had been made under the provisions of the will. I think, therefore, that there was no intestacy, and that the other members of the class take the whole fund.

Solicitors: *Farrar, Porter & Co.*; *Blyth, Dutton, Hartley & Blyth*; *S. Gissing Skelton*; *Boyce & Son*, for *Chancellor & Ridley, Dartford*.

J. R. B.

SHARP v. RICKARDS.

NEVILLE J.

[1908 S. 1554.]

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Nov. 11.

Mortgage — Redemption — Consolidation — Mortgage in Name of Trustee — Mortgages originally made by different Mortgagors — Assignment of Equities of Redemption to same Person.

S. executed to R. separate mortgages of four leasehold houses and assigned the equities of redemption to the plaintiff. One house was sold and the mortgage upon it paid off. The plaintiff then acquired the freehold of another house (No. 7) and granted a long lease of it to C., who executed a mortgage of the leasehold to R. In this transaction C. was a mere trustee for the plaintiff. Subsequently the plaintiff got rid of the freehold reversion in No. 7 and took an assignment from C. of the equity of redemption in the leasehold interest. R. died, and this summons was taken out by the plaintiff against his executors for redemption of No. 7. The defendants claimed to consolidate the mortgage on No. 7 with those on the other three houses. All the mortgages contained clauses excluding s. 17 of the Conveyancing Act, 1881:—

Held, that the fact that C. was a trustee for the plaintiff gave the defendants no right to consolidate with the mortgage of No. 7 made by C. the other three mortgages, for a mortgagee has no right for the

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purpose of consolidation to go behind the mortgagor and inquire into equitable interests.

Held, also, that the assignment of C.'s interest to the plaintiff gave no right of consolidation, for the right to consolidate can only arise when all the mortgages were originally made by the same mortgagor. It is not enough that the different equities of redemption have got into the same hands by assignment.

By three several indentures of mortgage, two of which were dated December 13, 1897, and the other was dated January 10, 1898, John Stead mortgaged three leasehold houses and shops, known as 1, 2, and 3, Clayton Terrace, Upper Tooting, by demise to C. J. Rickards for 465*l.* each. Each of these mortgages contained a clause excluding s. 17 of the Conveyancing Act, 1881, and on January 10, 1898, Stead signed a memorandum of further charge charging the three principal sums and interest upon all three houses and expressly agreeing that no one of them should be redeemed or redeemable until repayment of all such principal moneys and interest. On February 8, 1898, Stead executed a similar mortgage of the leasehold messuage No. 4, Clayton Terrace, and on the same day he executed a similar memorandum of further charge and express consolidation of all four mortgages. On August 10, 1898, Stead assigned to the plaintiff Sharp all four houses subject to the mortgages. The house No. 4 was then sold and the mortgage thereon paid off out of the purchase-money. About the same time the plaintiff purchased the fee simple of No. 7, Clayton Terrace, and on January 6, 1899, he demised No. 7 to Cooper for ninety-nine years. On January 7, 1899, Cooper executed a mortgage to Rickards by demise of the leasehold interest in No. 7, in a form similar to the other mortgages, for 465*l.* This mortgage contained a clause empowering the mortgagee to consolidate the security with any other security on property not comprised therein for any money due to him from the mortgagor and excluding s. 17 of the Conveyancing Act, 1881, but there was no such memorandum of further charge as in the other cases. It was admitted that Cooper was a mere trustee for the plaintiff and that the money was really advanced to the plaintiff.

It was alleged by the defendants that the mortgage of No. 7 was agreed to be given in substitution for the mortgage of No. 4,

but the judge held on the evidence that it was an independent transaction. NEVILLE J.

At some time before March 1, 1900, the plaintiff conveyed away the freehold of No. 7, and on that day Cooper assigned the equity of redemption in the leasehold interest in No. 7 to the plaintiff.

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Rickards died on December 23, 1906; the defendants were his executors and had given the plaintiff notice to pay off all the mortgages. The plaintiff took out this summons for the redemption of No. 7; the defendants claimed the right to consolidate that mortgage with those on 1, 2, and 3.

An objection was taken on behalf of the defendants that questions of consolidation could not be tried upon an originating summons, but this was finally waived, and the hearing proceeded by consent.

C. Hartree, for the summons. The doctrine of consolidation only applies where the original debts were all due from the same mortgagor. It has never been extended to the case of several mortgagors, and there is no case in which it has been attempted to set up such an extension.

The fact that Cooper was a trustee for the plaintiff gave the mortgagee no right to consolidate the mortgage made by Cooper with those of which the equity of redemption had been assigned to the plaintiff. A mortgagee cannot go behind the mortgagor and look into equitable interests: see the judgment of James L.J. in *In re Raggett*. (1) [He also referred to *Cummins v. Fletcher*. (2)]

The subsequent assignment of the term to the plaintiff makes no difference. The whole doctrine of consolidation of mortgages rests on the fact that the original mortgages were all made by the same mortgagor. The rule is so stated by Lord Selborne in *Jennings v. Jordan*. (3)

H. Greenwood, for the defendants. Consolidation has been enforced in a case where the original mortgages were made by different mortgagors: *Roe v. Soley*. (4)

[NEVILLE J. The facts are obscurely stated, but I think it is

(1) (1880) 16 Ch. D. 117, 119.

(3) (1881) 6 App. Cas. 698, 700.

(2) (1880) 14 Ch. D. 699.

(4) (1770) 2 W. Bl. 726.

NEVILLE J. clear that in that case the original mortgagor was the same in all three mortgages. If it was not so, I do not think the decision could be sustained at the present day; the side-note is much too wide.]

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Sect. 17 of the Conveyancing Act, 1881, which provides that a mortgagor seeking to redeem any one mortgage shall, by virtue of this Act, be entitled to do so without paying any money due under any separate mortgage made by him or by any person through whom he claims, clearly recognizes that the doctrine of consolidation may apply where the mortgages have been made by different mortgagors. *Pledge v. White* (1) established the doctrine laid down in *Vint v. Padget* (2) that the principle of consolidation applies where several mortgages have come into one hand by assignment. By analogy it applies where several equities of redemption have come by assignment into one hand. In this mortgage there is an express contract to consolidate.

NEVILLE J. In this case the testator of the respondents was the mortgagee under four separate mortgages of four houses known as 1, 2, 3, and 4, Clayton Terrace, and the equity of redemption in those properties had been assigned to the plaintiff Sharp subject to the mortgages. I think that as to these four houses the right of consolidating the mortgages undoubtedly existed at the date of the assignment to Sharp. Subsequently Sharp paid off the mortgage on No. 4, which he had purchased subject to a contract for sale, out of the moneys received on completion; and thereupon the mortgagee's solicitor received principal, interest, and costs. I have been asked to look at the negotiations between the parties for the purpose of finding extrinsic evidence of the intention of the parties that a mortgage of No. 7, of which Sharp owned the freehold, should be substituted for the mortgage on No. 4. I am of opinion that I cannot do so. I can only look at the instruments themselves, and in them I can find no ground for thinking that any such substitution was intended. I think that the mortgage on No. 7 was in respect of a new and independent advance. No doubt Sharp was the person who obtained this advance, but the security was given in this way. Sharp, who was the freeholder

(1) [1896] A. C. 187.

(2) (1858) 2 De G. & J. 611.

of No. 7, granted a long lease to Cooper, and Cooper executed a mortgage of the term to Rickards. What then was the position at that date with respect to the right of Rickards to consolidate the mortgage on No. 7 with the other three mortgages? In my opinion he had no such right. The doctrine of consolidation of mortgages is not one which in my opinion ought to be extended at this time of day. The mortgage of No. 7 was created by Cooper, not by Sharp, so that on the face of the documents the equity of redemption in No. 7 was not vested in the same person as the equities of redemption in Nos. 1, 2, and 3. I have the authority of James L.J. for saying that the Court will not go behind the mortgagor himself to ascertain the persons who are entitled to equitable interests in the property. He distinctly lays down the rule in *In re Raggett* (1) that "a mortgagee has no right to look into any transactions between the mortgagor and third parties." I think, therefore, that at the date of the mortgage of No. 7 no right to consolidate existed.

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But Sharp afterwards took an assignment of the equity of redemption in No. 7 from Cooper, and it is said that a right of consolidation arose on that assignment, because the equities of redemption in all four houses thereupon became vested in the same person, and the mortgages were already in the hands of one mortgagee. It is said that I ought to come to the conclusion that the right of consolidation then arose, by an argument from analogy, as the converse of the rule laid down in *Vint v. Padget*. (2) That case decided that where the equities of redemption of two estates mortgaged to different persons were vested in the same person by the same deed, and the mortgages afterwards came into the hands of the same mortgagee, he had the right of consolidation as against the owner of the equity of redemption in both. I do not think that the case of *Vint v. Padget* (2) has any general application. It stands on a very peculiar footing. It was upheld in *Pledge v. White* (3), but it appears from the judgment of Lord Davey that this was only because it had stood so long that the House of Lords thought it might do harm to reverse it, not because they approved any principle which it established. I

(1) 16 Ch. D. 119.

(2) 2 De G. & J. 611.

(3) [1896] A. C. 187.

NEVILLE J. think I ought not to apply it for the purpose of deducing, by analogy, any rule which would apply to the converse case of equities of redemption originally separate having come to the same hands. The Court has never recognized a right to consolidate in such a case. The claim to consolidation therefore fails, and the plaintiff must have an order for the redemption of No. 7 separately.

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 SHARP  
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Solicitors: *J. Moverley Sharp; Maude & Tunnicliffe.*

J. R. B.

PARKER J.

*In re* JOHNSON'S PATENT (No. 2).

[1908 J. 036.]

1908  
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July 21, 22,
23, 28, 29, 31.

Patent—Petition for Prolongation—Questions to be considered—Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 18.

The power given to the Court by s. 18 of the Patents and Designs Act, 1907, to extend the term of a patent is a discretionary power which can only be exercised when the Court is satisfied that the patentee has been inadequately remunerated by his patent, and it is only where the value of the patentee's disclosure to the public largely exceeds the benefit derived by him from the patent that he can be said to have been inadequately remunerated. On an application for extension, the first question for consideration is the nature of that disclosure, and, to determine what that nature is and what its value to the public is, questions of novelty and subject-matter, though not directly in issue, are of considerable materiality; evidence on these points cannot be altogether excluded, and it is the applicant's duty at the outset to bring to the notice of the Court all that may in any way affect its judgment on these matters, but as a general rule it is sufficient for the petitioner to shew a *prima facie* case in support of novelty and subject-matter. The Court will pay especial attention to the fact that, although the thing disclosed may be minute as compared with the sum total of what was known previously, it may be the *sine qua non* of the successful application of existing knowledge and thus fall within the category of great inventions.

For the purpose of considering whether a patentee has been adequately remunerated profits on his foreign as well as on his English patents must be taken into account, and some allowance ought to be made for future profits on either which will probably be received before their expiration.

An applicant for extension must prove that he has done all a patentee could do to launch his invention on the British market, and it is his duty to state in his petition the facts of any alleged anticipation and to give

such explanation as he can thereof, without leaving it to an objector to bring out those facts. PARKER J.

Duty of the Comptroller-General, when opposing an extension on the ground that British traders will unduly suffer if the extension be granted, defined.

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ON October 23, 1894, letters patent (20,207 of 1894) were granted to James Johnson for an invention communicated from abroad by James Gayley, an American, of an "Improved method of and apparatus for extracting moisture from air for blast furnaces and converters," for the term of fourteen years. In March, 1908, James Gayley, of New York, became the registered proprietor of the letters patent.

In April, 1908, Gayley petitioned the High Court of Justice for an order under the Patents and Designs Act, 1907, that the letters patent might be extended for a further term of fourteen years, or such other term as to the Court should seem fit.

On May 28, 1908, the Haslam Foundry and Engineering Company, Limited, and Sir Alfred Seale Haslam gave notice of certain objections to the granting of the prayer of the petition, and on June 27, 1908, Parker J. made an order on them to give certain particulars: *In re Johnson's Patent*. (1)

The petition was heard by Parker J. on July 21, 22, 23, 28, and 29, 1908.

The petitioner admitted a realized profit, in respect of his American patent for the same subject-matter, of 7500*l.*, and in respect of the English patent of over 1000*l.* He had omitted to state in his petition that he had applied for a patent for the same subject-matter in Germany, but had failed to obtain it.

Patents in other countries had been allowed to lapse, owing, as he stated, to the fact that the petitioner had been unable to get manufacturers to give the invention a trial.

Cripps, K.C., Walter, K.C., and Percy F. Wheeler, in support of the petition. This is the first application for prolongation of a patent which has been made under the Patents and Designs Act, 1907. (2) In considering whether the patent should be extended

(1) [1908] 2 Ch. 487.

(2) 7 Edw. 7, c. 29, s. 18:—

that his patent may be extended for a further term

"(1.) A patentee may . . . present a petition to the Court praying

"(4.) The Court, in considering its decision, shall have regard to the

PARKER J. the Court ought to apply the principles by which the Privy Council was guided when considering applications for extension. The invention of the petitioner was novel and of great merit and utility. The difficulty encountered in getting manufacturers to try the invention, with the consequence that the working of it in England has been smaller than it otherwise would have been, are reasons for extending the patent: *In re Currie & Timmis' Patent*. (1) Non-user is not an insuperable objection where the patent is of proved utility—*In re Hughes' Patent* (2)—or the non-user is satisfactorily accounted for: *Southby's Patent*. (3) The fact that a patent has not been brought into practical use is only a presumption against its utility which may be rebutted, as, for instance, by shewing that there is a very limited market for an invention of the kind: *In re Herbert's Patent*. (4) The fact that a patent has only been used to a limited extent is not per se a reason for refusing an extension—*In re Stoney's Patent* (5)—nor is the fact that patents in other countries have been allowed to lapse: *In re Semet & Solvay's Patent*. (6) The absence of anticipation distinguishes this case from *In re Stewart's Patent*. (7) [They also referred to *Cornish v. Keene*. (8)]

Colefax and *J. H. Gray*, for the objectors. The invention has no novelty or merit about it, and the patent ought not to be extended. Moreover, the petitioner has been adequately remunerated by his patent. The Privy Council refused, unless in a very strong case, to extend a patent where the owner had not pushed his invention in the United Kingdom: *In re Pieper's Patent*. (9) The petitioner has neither pushed his invention

nature and merits of the invention in relation to the public, to the profits made by the patentee as such, and to all the circumstances of the case.

“(5.) If it appears to the Court that the patentee has been inadequately remunerated by his patent, the Court may by order extend the term of the patent for a further term not exceeding seven, or, in exceptional cases, fourteen years, or may order the grant of a new patent for

such term as may be specified in the order and containing any restriction, conditions and provisions the Court may think fit.”

(1) (1897) 15 Rep. Pat. Cas. 63.

(2) (1879) 4 App. Cas. 174.

(3) [1891] A. C. 432.

(4) (1867) L. R. 1 P. C. 399.

(5) (1888) 5 Rep. Pat. Cas. 518.

(6) [1895] A. C. 78.

(7) (1885) 3 Rep. Pat. Cas. 7.

(8) (1835) 1 Web. Pat. Cas. 501.

(9) (1895) 12 Rep. Pat. Cas. 292.

nor explained his neglect to do so, and he has not shewn the candour which is required from an applicant for extension. PARKER J.

Sir W. S. Robson, A.-G. and Sargent, for the Comptroller-General of Patents, Designs, and Trade Marks. The Court has a discretion as to whether the extension should be granted or refused. Sect. 18 of the Patents and Designs Act, 1907, requires the Court to have regard not only to the nature and merits of the invention in relation to the public and the profits made, but to "all the circumstances of the case," and when the patentee has been "inadequately remunerated by his patent" the extension may be granted. It is the patentee's duty to push his patent, and if he fails in that duty until the eve of the expiration of the patent an extension will not be granted: *In re Patterson's Patent* (1); *In re Dolbear's Patent*. (2) The petitioner has not pushed his invention either in this country or America. The invention may be said to have merit, but no such extraordinary merit as to deserve protection by letters patent for more than the ordinary period of fourteen years. Almost the only purpose for which the petitioner has used his patent seems to be to protect himself in America. If an extension is granted it should only be for the three years during which the American patent is unexpired. If a longer period is granted manufacturers in this country will be in a less favourable position than those in America.

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Cripps, K.C., in reply.

Cur. adv. vult.

July 31. PARKER J. This is a petition for the extension of letters patent No. 20,207 of 1894 for an improved method of and apparatus for extracting moisture from air for blast furnaces and converters. The petition is presented under s. 18 of the Patents and Designs Act, 1907, and in exercising the discretionary power conferred by that section the Court must have regard to the nature and merits of the invention in relation to the public, to the profits made by the patentee as such, and to all the circumstances of the case. It is only if it appears to the Court, after considering these matters, that the patentee has

(1) (1849) 6 Moo. P. C. 469.

(2) (1896) 13 Rep. Pat. Cas. 203.

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been inadequately remunerated by his patent, that the power to extend the term of the patent can be exercised. The consideration which supports the grant of the monopoly created by letters patent being in fact the disclosure of something of value to the public, it is only where this value largely exceeds the benefit derived by the patentee from his invention that the patentee can be said to have been inadequately remunerated; but, even where this inadequacy exists, there may be other circumstances sufficient to induce the Court to refrain from exercising its power. The first question, therefore, which arises on a petition for extension is the nature of the disclosure contained in the specification; for without deciding first on the nature of the disclosure made it would be impossible to form an opinion on its value to the public. For the purpose of determining the nature of the disclosure made and its value to the public questions of novelty and subject-matter, though not directly in issue, are necessarily of considerable materiality; for without considering what was already known at the date of the letters patent it is impossible to arrive at any adequate conception of the nature of the disclosure made by the patentee, and, in the same way, the value of this disclosure to the public cannot be altogether independent of the extent of inventive ingenuity required to arrive at the thing disclosed. While, therefore, it would be wrong to allow detailed scientific evidence such as is usual in actions for infringement or petitions for revocation, evidence as to novelty or subject-matter cannot be altogether excluded. It is the duty of the petitioner at the outset to bring to the notice of the Court all that may in any way affect the judgment of the Court on these matters. The length to which the petitioner's witnesses should be cross-examined and the extent to which an objector should be allowed to bring evidence impeaching the validity of a patent on the ground of want of novelty or subject-matter must be left to the determination of the judge who hears the petition, having regard to the nature of the individual case. As a general rule, if, after hearing the evidence of the petitioner's witnesses, there be in the opinion of the Court a *prima facie* case for upholding the validity of the patent in respect of novelty and subject-matter, the Court need not, in my opinion, investigate the

matter further. It is always open to an objector to challenge the validity of a patent in proceedings more appropriate for that purpose. The Court on a petition for prolongation ought, in my opinion, to pay especial attention to the fact that the thing disclosed may be minute compared with the sum total of what was known before, and yet may be the sine qua non of the successful application of existing knowledge, and thus fall within the category of great inventions.

At the date of the patent in question it is, I think, clear that those concerned in the art were fully alive to the disadvantages, for the purpose of blast furnaces and converters, of the moisture with which untreated atmospheric air is in varying degrees always impregnated. Not only was heat consumed in the furnace or converter in the process of disintegrating this moisture into its constituent elements, thus entailing an unproductive consumption of fuel, but the variations in the amount of moisture from day to day and hour to hour made it extremely difficult to foresee the amount of fuel which at any moment would be required, and this necessitated a large reserve of heat in the furnaces or converters, for fear that by some sudden increase of moisture the heat might be reduced below what was essential for the proper reduction of the metal. Further, any sensible variations in the heat of the furnaces or converters caused a corresponding variation in the grading or quality of the product, and the possibility of being able to work regularly to the particular grade or quality required by the market was thus diminished, and serious loss entailed. It was well known, however, that moisture could be extracted from atmospheric air either by chemical treatment—that is, by passing the air over or through some substance which would absorb the moisture—or by condensation under refrigeration. Both these methods had been suggested for drying the air usually supplied to blast furnaces or converters, but neither method had been tried. There were various objections to the chemical method, and as to refrigeration, the certainty that the cost of erecting the necessary machinery would be great, coupled with the uncertainty of the extent of the advantages to be derived until trial were actually made, had hitherto deterred every one from making the attempt. Finally,

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it was also well known that the quantity of moisture with which air could be saturated diminished with the temperature of the air, the saturation point of air at any particular temperature having been already fully worked out. The limits of the possible variations of the quantity of moisture in air of any particular temperature were therefore equally matters of common knowledge. It follows that any one minded to dry the air blast for furnaces or converters by any process of refrigeration would naturally reduce the temperature of his air to as low a degree as might be without unduly increasing the cost of the process. It was under these circumstances that the petitioner, who is an American, made his invention and communicated it to J. Johnson, to whom the letters patent in question were in due course granted. The nature of the invention is stated in the specification in the following words: "In the practice of my invention I remove the moisture from the air and render it dry or so dry at least that the percentage of moisture contained in the air is small and practically uniform, by subjecting it to artificial refrigeration so that its temperature shall be reduced to zero Centigrade, whereby the moisture is condensed and may be collected and withdrawn in the form of water, the air being fed to the furnace or converter under compression, and being maintained constantly under compression from the time it leaves the blowing engine until it reaches the furnace. The blowing engine may be located between the drying apparatus and the blast furnace or converter, or the drying apparatus may be employed after the blowing engine, and between it and the furnace and converter, and by my broader claim I intend to cover either form." It appears from this that the nature of the refrigerating machinery used in the process is not, according to the patentee, of the essence of the invention, and, indeed, it was not contended by counsel for the petitioner that there was anything new in the particular machinery which the patentee proceeds to describe. Mr. Swinburne and other witnesses called for the petitioner agreed that no one whose object was to reduce the temperature of the air to zero would have had any difficulty in finding the means to refrigerate the air to this extent. In this connection I may refer also to another part of the specification: "Many

changes may be made in the form and arrangement of the apparatus employed, and the air may be cooled either in blast furnaces or converters, without departure from my invention, since I consider myself the first to dry the air by cooling it artificially to 0 deg. C. either before or after entering the blowing engine, and maintain the air under compression from the time it leaves the blowing engine until it enters the furnace or converter." The form of the claiming clauses of the specification points to the same conclusion. The first two clauses deal with what the inventor calls his broader claims and have no reference to the particular refrigerating machinery which may be employed. The last four clauses refer to the particular refrigerating machinery employed, but only claim the exclusive use of such machinery in combination with the processes claimed by the first two clauses. It follows that the essential parts of the invention must be looked for in the first two claiming clauses, which are as follows: "First, the method of feeding the air blast to blast furnaces or converters, which consists in cooling the air artificially to 0 deg. C., thereby causing its moisture to be eliminated or reduced to a small and practically uniform percentage, feeding the dried air under compression from the time it leaves the blowing engine until it enters the furnace substantially as described. Second, the method of feeding the air blast to blast furnaces or converters, which consists in compressing the air, passing it under compression into an enlarged chamber, but without substantial expansion therein, and cooling it in the said chamber to at least (1) 0 deg. C., thereby causing its moisture to be eliminated or reduced to a small and practically uniform percentage, feeding the dried air into the furnace or converter, and maintaining it constantly under compression from the time it leaves the blowing engine until it enters the furnace substantially as described." The only differences between the methods claimed respectively in those two clauses appear to be these: (1.) In the first clause the refrigeration takes place before the air is taken into the blowing engine. In the second clause it takes place between the blowing engine and the furnace or converter. (2.) In the first clause the

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(1) "At most" would be more correct, but the sense is plain.

PARKER J. air is reduced in temperature to 0 deg. C. In the second clause it is reduced to at least 0 deg. C. I do not think that for the present purpose there is anything of real importance in these differences, though a point was made of the fact, admitted by the petitioner, that no sensible man would now attempt to cool the air in its passage from the blowing machine to the furnace or converter. The real point is the direction to cool your air to at least 0 deg. C., whether you cool it before or after it enters the blowing machine. There is, it is true, the further direction to keep the air under constant pressure in its passage from the blowing machine to the furnace or converter, but, though it is a little difficult to account for the prominent position which the direction occupies in the specification, it does not, in my opinion, form an essential part of the invention. It may have been inserted because air to a blast furnace or converter is, and must be, supplied under compression, or possibly to shew that refrigeration by means of allowing an expansion of the blast air after its compression in the blowing machine was outside the claim. Be that as it may, I am of opinion that on the true construction of the specification, and having regard to the state of knowledge at the time, the disclosure which constitutes the consideration for the patent lies in the direction to reduce the temperature of the air to at least 0 deg. C. The patentee in effect says in his specification, "If you cool your air to or below 0 deg. C., not only will you practically free your air from moisture by reducing the moisture left to so small an amount as to be negligible, but you will secure practical uniformity of moisture, the limits of possible variation in the actual amount of moisture which is left in air cooled to or below 0 deg. C. being so narrow as to be also negligible. If you are not prepared to cool your air to this extent, it is not worth while to dry it by refrigeration at all." The novelty in this would appear to lie in pointing out that at a temperature of 0 deg. C. or under, the moisture left in cooled air, and any variation in the quantity of such moisture, will be practically harmless. I am inclined to think that the statements made by the patentee in this respect are open to some criticism. Theoretically, at any rate, the reduction to 1 deg. C. ought for practical purposes to be as good as a reduction to 0 deg. C. It

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is said that practically there is a vast difference, due to the fact that moisture segregated by cooling may, if the air be cooled to 1 deg. C. only, still exist as fog, and be carried with the air into the blowing engine, and so into the furnace or converter. This is no doubt true, but on the evidence I do not think I can conclude that this danger is obviated when the air is cooled to 0 deg. C. At any rate, in practical working the air is cooled to a temperature considerably below 0 deg. C. Further, the specification contains no reference to any advantage in this respect of 0 deg. C. Indeed, from parts of the specification it would even appear that fog was anticipated and provided against.

Assuming, however, the absolute correctness of the statements to which I am referring, it still remains to be considered what was the value to the public of the disclosure therein contained. I have anxiously considered all that has been said on both sides on this part of the case, but I cannot convince myself that what the petitioner disclosed in his specification was of such great value as he would have me believe. I recognize fully the enormous commercial success of cooling the blast air supplied to furnaces or converters so as practically to eliminate the moisture and thus secure practical uniformity. The advantages of so doing appear to me even greater than the petitioner himself anticipated, but I am doubtful how far this success can be said to be due to what the petitioner disclosed in the letters patent in question. The petitioner was not the first to suggest the drying of the air for furnaces or converters by means of refrigeration, or to point out the nature of the advantages which would accrue if the air were so dried. This had been already suggested and pointed out, and no one could, in my opinion, at the date of his patent have secured a monopoly simply for drying air for blast furnaces or converters by refrigeration. The petitioner was not the first to devise machinery by which the refrigeration of the air could be effected. Such machinery was well known at the date of his patent; it was open to any one to dry the air for his furnaces or converters. Every one knew the nature of the advantages to be gained, and the proper machinery could be erected by any competent engineer. The real difficulty was the certainty of the cost coupled with the uncertainty of the extent, measured in money,

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PARKER J. of the benefit to be derived from the process. If the process
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were to be tried at all, it was, I think, reasonably certain that the refrigeration would be carried down to or below zero Centigrade, for the best results were known to have been obtained working with untreated atmospheric air in winter, with the atmospheric temperature below freezing point; and it was also well known that the lower the temperature the less the moisture and the narrower the limits of possible variations in the moisture. There was thus every inducement to cool to or below zero Centigrade, and no inducement to stop at any higher temperature. The whole question being one of the pecuniary value of the result compared with the cost entailed, it might have been of value to point out the lowest temperature to which the air needed to be cooled, for this might be very material on the question of cost; but I cannot read the specification as pointing out the lowest temperature necessary in the process, for the claim covers zero and all temperatures below zero Centigrade. The true meaning of the patentee appears to be that you must go to zero at least, not that you need not go below zero; and, indeed, I am inclined to think on the evidence that to avoid certain practical difficulties from fog you have in practice to go considerably below zero.

Having said this much as to the nature and value to the public of the disclosures made, I will say a word about the patentee's remuneration. For the purpose of considering whether a patentee has been inadequately remunerated I am of opinion (1.) that profits on his corresponding foreign patents as well as on his English patents must be taken into account, and (2.) that some allowance ought properly to be made for profits which, though not yet received, will in all probability be received in respect of both the English and the foreign patents before their expiration. The petitioner in the present case admits a realized profit in respect of the American patent of some 7500*l.*, and in respect of the English patent of over 1000*l.* Unless something very unforeseen happens, he will receive further profits in respect of both the English and American patents, and he anticipates that under the American patent his receipts will be very considerable—more, in fact, than he has yet realized in America.

Under these circumstances I am not satisfied that he can be said to have been inadequately remunerated, having regard to the nature and character of his invention. I do not for a moment dispute that the petitioner has been a public benefactor, but it appears to me that the benefit he has conferred on the public lies in the energy and perseverance which he displayed in urging his company to give the refrigeration process a trial quite as much as, if not more than, in anything which he disclosed by his letters patent.

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Having come to this conclusion, it is not really necessary to deal with the other aspects of the case, but, as this is the first petition under s. 18 of the Act of 1907, I think it may be useful to add a few further observations. In the first place, I do not consider that the reasons given by the petitioner for not bringing his invention prominently before British manufacturers are at all satisfactory. His attitude of mind appears to have been that if he could not persuade his own firm to give his invention a trial he certainly would be unable to persuade any one else, either in America or in England. This may have been quite true with regard to the invention in question, but it is, in my opinion, incumbent on a patentee who invokes the discretionary power conferred by s. 18 to prove that he has done all a patentee could do to launch his invention on the British market. If an invention be of that large value to the public which alone will justify the term of the patent being extended, there is certainly a chance, and I should say a reasonable chance, of some one being found in this country enterprising enough to give it a trial. The least that can be required of the patentee is to shew that he has made an effort to find such a person. The petitioner had been able to convince himself of the value of his process, and I cannot ignore the possibility that with reasonable effort he might have convinced others. Again, it appears in the present case that the petitioner applied for a patent to protect his invention in Germany, but did not obtain one, partly, at any rate, because of a prior German patent, which was brought forward as an anticipation. It may well be that the prior patent did not in reality anticipate the petitioner's invention, but it was, in my opinion, the duty of

PARKER J. the petitioner to state these facts in his petition, referring to the
1908 alleged anticipation and giving such explanation as he might
JOHNSON'S consider possible or desirable. It ought not to be left to some
PATENT opponent to bring out such facts as these. Neglect to state a
(No. 2), fact which is within the petitioner's knowledge, and which it is
In re. obviously material that the Court also should know, is not con-
sistent with the candour and good faith always required of a
petitioner for extension of a patent. Lastly, I desire to say that
when the Comptroller opposes the extension of a patent on the
ground that the traders of this country will, if the patent be
prolonged, be put at disadvantage compared with the traders of
some other country or countries, the Court ought to be supplied
with proper statistics or other information as to the nature and
extent of the competition which is feared. The Court would, in
my opinion, do injustice in refusing a petition on any such
ground merely because of some suggestion made in argument,
or in the course of cross-examining a witness whose attention
has not been directed to the particular point. It is impossible
to tell, on the evidence before me, whether there is really any
competition between English and foreign manufacturers of pig
iron and steel, either in English or other markets, much less the
extent or keenness of such competition, if any. The real facts, if
relied on, should be proved in the usual way.

Petition dismissed.

Solicitors for petitioner: *Steavenson & Couldwell.*

Solicitors for objectors: *Bower, Cotton & Bower.*

Solicitor for Comptroller-General: *Solicitor to the Board of Trade.*

F. E.

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PARKER J.

[1907 R. 290.]

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*Company—Allotment—“The Prospectus”—Minimum Subscription not stated
—More than one Prospectus—Application for Shares—Voidability—
Companies Act, 1900 (63 & 64 Vict. c. 48), s. 4, sub-ss. 1, 4; s. 5.*

The expression “the prospectus” in s. 4, sub-ss. 1, 4, of the Companies Act, 1900, means that document offering capital to the public upon the basis of which the applicant has actually subscribed.

The statement of the minimum subscription on which the directors may go to allotment, which the section requires to be inserted in the prospectus, must be an express statement, and not one which can be implied from other statements in the prospectus.

THE Landaulette Motor Cab Company was incorporated in 1906. On November 14, 1906, it issued a prospectus offering to the public for subscription 70,000 shares of 1*l.* each in the capital of the company, on which 5*s.* per share was to be paid on application and allotment respectively. This prospectus, which was duly filed with the Registrar of Joint Stock Companies, named the number of shares mentioned in the articles of association, namely, 1000, as the minimum subscription upon which the directors might proceed to allotment, stated that the preliminary expenses were estimated at 5000*l.*, and gave the names of the parties to and the dates of and general character and effect of each of several contracts which had been entered into by the company.

On November 26, 1906, a French translation of the prospectus in an abridged form was published in a French newspaper called *Le Journal*. This translation did not name any amount as the minimum subscription upon which the directors of the company might proceed to allotment, but it stated that the company was in a position at once to proceed to allot 1000 shares according to the provisions of its articles of association, but that 15,000 had already in fact been subscribed. It stated that the capital of the company consisted of 75,000 shares of 1*l.* each; that this was an issue of 70,000 shares, the whole of which, except

PARKER J. what was required for preliminary expenses, would be available
1908 for working expenses; and that the cost of these preliminary
ROUSSELL expenses had been estimated at 5000 francs. It did not specify
v. the dates or the names of the parties to certain material contracts
BURNHAM. under which the company were bound (1.) to purchase 150 motor
cabs from the Farmar Automobile Company, (2.) to allot 4250
shares and pay 7000*l.* in cash to the Newfoundland Industries,
Limited, for promotion and underwriting services, and (3.) to give
a commission of 750 shares and 1500*l.* cash to the Newfoundland
Industries, Limited, for underwriting 15,000 shares, but it stated
that all contracts were open to inspection. A form of application
for shares was published at the foot of the prospectus. The
plaintiff was a Frenchman resident in France. He saw the
prospectus in *Le Journal* and read it, and, in consequence of
the statements contained in it, cut the application form out of the
newspaper and filled it up, and on November 26, 1906, sent it to
the company, applying for 700 ordinary shares. These were
allotted to him on November 27, and he paid the company 175*l.*
The remaining 15*s.* per share had been called up, but the
plaintiff declined to pay pending the hearing of this action.

On December 9, 1906, he wrote to the company, repudiating
the allotment and asking for a return of his money. The com-
pany refused to cancel the allotment, and he brought this action
against the directors and the company for cancellation of the
allotment, rectification of the register of members of the company
by removing his name therefrom, and repayment of the 175*l.*
with interest. He subsequently discontinued against the directors
and went on with the action against the company only.

It was admitted at the bar that the company were not in a
position to prove that the prospectus was published in the French
newspaper without their authority.

Gore-Browne, K.C., and *Rostron*, for the plaintiff. The allot-
ment of shares to us ought to be cancelled and the money we
have paid returned on several grounds. In the first place, the
prospectus on which we relied was the document published in
Le Journal, and it contains no statement of the minimum
subscription upon which the directors may proceed to allotment

as required by s. 4, sub-s. 1 (a), of the Companies Act, 1900. Therefore we are entitled under sub-s. 4 to repayment of the money, and under s. 5 to cancellation of the allotment. The fact that the company had issued another prospectus which complied with the statutory requirements is immaterial. The expression "the prospectus" in s. 4 means the document issued by the company on which the applicant relied. If the plaintiff had been informed of the true position of affairs on all these points he would not have subscribed.

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Romer, K.C., and *Sheldon*, for the company. When the plaintiff applied for shares we naturally supposed that he relied on the real prospectus, not on a French advertisement.

[PARKER J. If you accepted his offer on that footing there was no contract. On the other hand, if you accepted it on the footing that he relied on the French prospectus, you are bound by it.]

If that is so, no company could safely proceed to allotment. It would be impossible to ascertain what prospectus was relied on. In this case it is clear that the plaintiff did not rely on any statements in or omissions from the prospectus. He really did not understand what he was doing. But the statement in the prospectus of the minimum subscription is sufficient. The real facts are clearly implied, and it is not necessary to follow the words of the Act. The articles are referred to in plain terms. In the absence of some of our witnesses we are forced to admit that the prospectus published in *Le Journal* was published with our authority, but even so it was clearly only an advertisement of the original prospectus. The expression "the prospectus" in s. 4 means the real prospectus of the company, not any document which the applicant assumes to be the prospectus and relies upon. The definition of "prospectus" in s. 30 does not include such documents as that. There is only one document which can be "the prospectus," and it is not necessary to register every prospectus of a company.

Gore-Browne, K.C., in reply. It has been decided under the Directors' Liability Act, 1890, that the expression "the prospectus" in s. 3 of that Act means the prospectus on the faith of which debentures were taken: *Drincqbier v. Wood*. (1)

(1) [1899] 1 Ch. 393, 405.

PARKER J. [The question whether under s. 10 of the Companies Act, 1900, the plaintiff was entitled to rescission as against the company was also discussed, but, inasmuch as his Lordship expressed no opinion on that point, it is not considered necessary to report the arguments.]

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PARKER J. Under s. 4 of the Companies Act, 1900, it is made unlawful for a company, in cases to which the section applies, to proceed to allotment of any share capital of the company offered to the public for subscription unless certain conditions are fulfilled—that is to say, unless either the whole amount of the capital offered is subscribed, or the memorandum or articles of association of the company fix the minimum amount upon which the directors are authorized to proceed to allotment, and that minimum amount is stated in the prospectus and is in fact subscribed. If any allotment be made to an applicant for shares contrary to the provisions of s. 4 certain results are to follow, these results being specified in sub-s. 4 of s. 4 and in s. 5 of the Act. Sect. 4, sub-s. 4, provides: “If the conditions aforesaid have not been complied with on the expiration of forty days after the first issue of the prospectus, all money received from applicants for shares shall be forthwith repaid to the applicants without interest, and, if any such money is not so repaid within forty-eight days after the issue of the prospectus, the directors of the company shall be jointly and severally liable to repay that money with interest at the rate of five per centum per annum from the expiration of the forty-eight days: Provided that a director shall not be liable if he proves that the loss of the money was not due to any misconduct or negligence on his part.” Sect. 5, sub-s. 1, is as follows: “An allotment made by a company to an applicant in contravention of the foregoing provisions of this Act shall be voidable at the instance of the applicant within one month after the holding of the statutory meeting of the company and not later, and shall be so voidable notwithstanding that the company is in course of being wound up.”

Some doubt as to the meaning of the sections has been suggested, arising out of the possibility of a company issuing more than one prospectus. A prospectus is defined in s. 30 to mean

“any prospectus, notice, circular, advertisement, or other invitation, offering to the public for subscription or purchase any shares or debentures of a company,” and it appears to me to be a reasonable interpretation of the term “the prospectus” used in s. 4 to hold that although as regards every invitation issued to the public the statutory provisions apply, yet, when we come to the remedy, “the prospectus” is that document offering capital to the public upon the basis of which the applicant has actually subscribed. Any other interpretation leads to results which the Legislature could not have contemplated. For example, with regard to the obligation of returning the money, if the conditions have not been complied with, on the expiration of forty days after the first issue of the prospectus, the section says, in general terms, “all money received from applicants for shares shall be forthwith repaid.” Now, as a matter of fact, before the issue of shares to the public many persons, such as directors and promoters, may have applied for shares, and it is impossible to suppose that money paid in respect of shares so applied for ought to be repaid. The money which is to be repaid is the money which the applicant for shares on the basis of the prospectus has paid for those shares; and similarly in cases under s. 5, on the question whether the applicant is entitled to cancellation of the contract, the prospectus will be for that purpose the document which offered shares to the public on the faith of which he sent in his application. Otherwise, where more than one prospectus is issued, and one fulfils the statutory conditions and the other does not, a person who has subscribed on the faith of a prospectus by which he was not misled might yet have a right to be relieved of his contract because somebody else had subscribed on the faith of a prospectus which did not contain the statutory particulars. That is a result which the Legislature cannot have contemplated. In the present case the defendant company’s articles fixed 1000 shares as the minimum subscription on which the directors could go to allotment, and there is no doubt that the 1000 shares were subscribed. If then I can find in the prospectus offering the shares to the public a statement that that was the minimum subscription, the allotment to the plaintiff is not voidable under s. 5, but if I cannot find such a

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PARKER J. statement, it is voidable under the section. Having regard to the construction of ss. 4 and 5 to which I have referred, it appears to me that the prospectus, so far as the plaintiff is concerned, when he comes to enforce his statutory right under s. 5, is that document on the faith of which he applied for the shares in respect of which he is now seeking to have his name removed from the register. That prospectus appears to me to be undoubtedly the prospectus which appeared in *Le Journal* on November 26, 1906, although the company had previously issued another prospectus in England. It is not now disputed, and if it were I should hold as a fact, that that prospectus which appeared in *Le Journal* was published by the authority of the company. The point, therefore, simply reduces itself to this, whether I can find in the prospectus which appeared in *Le Journal* a statement that the minimum subscription on which the company could legally go to allotment was 1000 shares. I have read the prospectus through, and the only passage which can on any interpretation be said to contain such a statement is that which comes almost immediately after the conclusion of the estimate of the profits, and may be translated in manner following: "The company is in a position at once to allot 1000 shares according to the provisions of its articles, but 15,000 shares have already in fact been subscribed." It is suggested that I can read this passage as meaning that if 1000 shares be subscribed the company may go to allotment; and it is further suggested that a statement to that effect is inconsistent with the company being able to go to allotment on a less subscription, and that therefore there is a necessary implication that the minimum subscription on which the company can go to allotment according to its articles is 1000 shares. I very much doubt, however, whether a statement that a company may go to allotment if a certain number of shares be subscribed is a statement which names the minimum subscription, for as a matter of fact it is perfectly consistent with a legal ability to go to allotment on a less subscription, and it is the minimum which is to be named.

But even if there is such an implication as is suggested, I do not think it would be a sufficient compliance with the Act. The provision is inserted for the protection of applicants for

shares, that they may know the extent of the risk which they run having regard to the old practice of going to allotment where no sufficient capital has been provided for working expenses. In my opinion that is the object of the section, and it appears to me that the statement which the Legislature contemplated was an express statement, and not one which can be implied or inferred from other statements in the prospectus. So I cannot in this French document find a statement such as is contemplated by s. 4 of the Act, and it appears to me, therefore, that on that part of the case the plaintiff succeeds, and it is not necessary for me to add anything on the point of law which has been raised on the construction of s. 10 of the Act; but, having regard to the fact that this case may possibly go further, I think I ought to say something on the evidence on the other part of the case which deals with the legal results which flow from the misrepresentations in the prospectus. [His Lordship discussed the evidence at length, and, in conclusion, made an order that the plaintiff's application for shares should be cancelled, his name removed from the register, and the money he had paid returned to him.]

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Solicitors : *Waterhouse & Co. ; Poole & Robinson.*

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[1908 P. 490.]

July 22, 23,
24.

Lease—Covenants—Breaches—Re-entry—Compulsory Purchase by Public Body—Severance of Reversion—Involuntary Act of Lessor—Apportionment of Condition—Notices of Breaches—Sufficiency—Compensation—Damages—Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 68—Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 14.

In pursuance of statutory powers a county council gave notice to P. and D. for the compulsory purchase of a strip of land comprising one-third of the site of two cottages, with gardens, for the purpose of widening a road. P. was the owner of the reversion of the premises, which were subject to a lease granted in 1867 for a long term of years, and now vested in D. This lease contained covenants by the lessee to repair the cottages and cultivate the garden ground in a husband-like manner, with a proviso for re-entry on breaches of covenants. P. conveyed his interest in the strip to the council, but desired that the other two-thirds of the cottages should be left standing. The council, having purchased from D. the whole of the leasehold interest in the property and obtained an assignment of the lease, entered and entirely demolished the cottages, and let the garden ground for the purposes of a stonemason's yard. P. gave notices to the council, setting out the covenants in the lease, specifying the nature of the breaches, and requiring the council to remedy the same and make compensation. On their failure to comply, P. brought an action against the council to recover possession of the leasehold interest in the two-thirds on the ground of breaches of covenant, and he also claimed mesne profits and damages :—

Held, (1.) that the severance of the reversion having arisen from the involuntary and not the voluntary act of the lessor, the condition of re-entry was still enforceable, and the action maintainable : *Winter's Case*, (1572) 3 Dyer, 308 b, followed.

(2.) That P. was not limited to a claim for compensation under s. 68 of the Lands Clauses Consolidation Act, 1845, which was inapplicable to acts ultra vires of the council.

(3.) That the notices of breaches were sufficient within s. 14 of the Conveyancing and Law of Property Act, 1881, as it was unnecessary for the lessor to indicate what he required the lessee to do.

(4.) That P. was entitled to the relief asked and 100*l.* damages.

THE facts, as summarized from the judgment of the Court, were as follows :—

In 1901 the plaintiff, Lewis Piggott, became the owner in fee simple of two small one-storeyed cottages, with gardens around

them, known as Cooper's Cottages, Nos. 331 and 333, High Road, Willesden, having an area of about two thousand square feet and a frontage to the road of about thirty feet. The plaintiff's interest in the premises was reversionary, the land and houses being subject to an underlease dated December 14, 1867, for a term of fifty-five years less ten days, expiring on September 19, 1922, and at a ground rent of 2*l.* 15*s.* This lease was vested in one Henry Devonald. A prior lease of the premises, granted on February 9, 1863, had been surrendered and the term merged in the reversion. By the underlease of December 14, 1867, the lessee, for himself, his executors, administrators, and assigns, covenanted that he and they would at all times thereafter during the term well and sufficiently repair, uphold, support, maintain, sustain, and keep the cottages, and all buildings which might at any time thereafter during the term be erected and built on the premises, and all the garden and other walls and fences, with all manner of needful reparations whatsoever, and, further, that he and they would, during the term, cultivate the piece of ground thereby demised, and which should not form the site of any erections or buildings, in a husbandlike manner; and there was a proviso empowering the lessor to re-enter upon all or any part of the demised premises in the event of the lessee or his executors, administrators, or assigns, not performing the covenants of the lease. The cottages in question were let to tenants at 7*s.* 6*d.* a week each, the landlord paying the rates, which amounted to 6*s.* 8*d.* in the pound. The cottages had been built for about forty-two years, and were in the occupation of tenants in a humble sphere of life. A sum of 162*l.* had been expended upon them in 1901 after a fire, but they were not in a good decorative condition, and the gardens were untidy and neglected. Under the provisions of the Middlesex Light Railways Order, 1903, and the Acts incorporated therewith (which included the Lands Clauses Consolidation Act, 1845), the defendants were empowered to purchase lands at Willesden, including the front portion of Nos. 331 and 333, High Road, Willesden. Accordingly on October 25, 1904, they served on Mr. Piggott and Mr. Devonald notices to treat for the purchase of their respective interests in the premises so far as they abutted on the High Road and for a depth

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of from eight and a half to nine and a half feet back therefrom. The area of this required strip was some two hundred and fifty-nine square feet and represented about one-third of the site of each cottage. The plaintiff served no counter notice requiring the council to purchase the whole of his interest, and by an indenture of August 13, 1906, he conveyed to the council his interest in the strip for the sum of 32*l*.

Mr. Devonald required the council to purchase the whole of his interest in the premises, and in November, 1907, he assigned his underlease to the council for 210*l*. The result of this was that the plaintiff retained his ownership in fee of all the land, except the strip sold to the council, and the council stepped into Mr. Devonald's place as lessee of the land so retained by the plaintiff. The council had acquired the strip for the purpose of throwing it into and widening the road, and this necessitated the removal of so much of the cottages as was built on the strip. Accordingly on October 5, 1907, Mr. Clift Ford, the contractor to the council, wrote to Mr. Wakelam, their engineer, as follows :—

“ Dear Sir,

“ Railway No. 15. Ref. Nos. 331 and 333.

“ Possession of the above properties was given me some time since, but nothing could be done in the way of work there because a person was lying ill in one of the cottages. These are two ramshackle little cottages, and the back of the new boundary line would cut through about the centre. That being the case, I presume that I should pull down the whole of these places, as it would cost more to pull down the half and board up than to pull down altogether. These are very tumbledown places and very little better than sheds.

“ I shall be glad of your instructions.”

On October 8, 1908, Mr. Wakelam replied as follows :—

“ Dear Sir,

“ Railway No. 15. Order 1903. Ref. Nos. 331 and 333.

“ I beg to acknowledge the receipt of your letter of the 5th inst. You may proceed at once with the taking down of the portion required for widening the road from the two cottages mentioned. Do not cut away any more than is necessary, and

leave the premises safe for pedestrian traffic. I do not, however, wish you to spend any money in shoring or framing up, and if by leaving any of the property standing this is found necessary, the property must be taken down altogether."

Subsequently instructions were given, and the two cottages were totally demolished. There was evidence that the plaintiff was constantly in the neighbourhood while the demolishing was going on and was fully aware of what was being done, but he relied upon an agreement by the defendants to "reinstat[e] all works disturbed." Having thus cleared the ground of the buildings, the council in December, 1907, let all the premises, except the strip, to Morris Van Ryn, a stone and marble mason, at a rent of 7s. 6d. a week, he paying the rates. Mr. Van Ryn separated that which would make a hard foundation for a yard from the rest of the soil of the garden ground, which he scraped off and then removed altogether. When the plaintiff realized that his houses were gone, and that his gardens had been converted into a mason's yard, he on December 9, 1907, served upon the council three notices in accordance with s. 14 of the Conveyancing Act, 1881. The first notice set out the covenant as to repair contained in the underlease of December 14, 1867, and proceeded: "The above-mentioned covenant has been broken and the particular breach which is complained of is the demolition of the cottages comprised in the above-mentioned lease. I, the undersigned Lewis Piggott, being the person in whom the reversion expectant upon the determination of the above-mentioned lease is now vested, do require you to remedy the aforesaid breach, and to make compensation to me in money for such breach. On your failure to comply with this notice within a reasonable time, it is my intention to re-enter upon the said premises, and claim damages for breach of the said covenant." The second notice, after setting out the covenant to cultivate the ground in a husbandlike manner, continued: "The above-mentioned covenant has been broken and the particular breach which is complained of is the removal of the top soil of the said piece of ground." The third notice set out the same covenant and proceeded: "The above-mentioned covenant has been broken and the particular breach which is complained of is

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the user of the said piece of ground for the purposes of a mason's yard." The council failed to comply with these notices, and the plaintiff accordingly brought his action, claiming possession of the two-thirds of the premises comprised in the underlease of December 14, 1867, on the ground of breaches of covenant; mesne profits; and 240*l.* damages. By their defence the defendants denied the breaches of covenants, and submitted that the plaintiff was limited to a claim for compensation under s. 68 of the Lands Clauses Consolidation Act, 1845. They did not admit that the notices of breaches were sufficient within s. 14 of the Conveyancing and Law of Property Act, 1881, and asserted that the plaintiff had acquiesced in the demolition of the houses and that the action was not maintainable.

P. O. Lawrence, K.C., and *M. Beebee*, for the plaintiff. There have been clear breaches of covenants on the part of the defendants in respect of the failure to repair the cottages and to cultivate the gardens. The defendants as assignees of the underlease are bound by it: *Woodfall's Landlord and Tenant*, 18th ed. p. 674; *Gange v. Lockwood*. (1) It is a breach of the covenant to pull down buildings wholly or partially. The plaintiff's remedy is against the council. The case of *Imperial Gas Light and Coke Co. v. Broadbent* (2) shews that s. 68 of the Lands Clauses Consolidation Act applies only to things done under the powers conferred by the Legislature, and not to acts which are ultra vires. The principle upon which statutory powers are to be exercised is laid down in *Biscoe v. Great Eastern Ry. Co.* (3), namely, with moderation and discretion, and not negligently. If authority were needed to shew that the lease remained subsisting it would be found in the case of *Manchester, Sheffield and Lincolnshire Ry. Co. v. Anderson*. (4)

Jessel, K.C., and *Timins*, for the defendant council. In the first place this action, which is an action of ejectment, and so a strict action at law, is not maintainable, inasmuch as the lease was anterior to the Conveyancing and Law of Property Act, 1881, and the reversion has been severed by the conveyance of

(1) (1860) 2 F. & F. 115.

(3) (1873) L. R. 16 Eq. 636.

(2) (1859) 7 H. L. C. 600.

(4) [1898] 2 Ch. 394.

August 13, 1906. By this action the owner of the reversion of part is endeavouring to take advantage of the breaches of covenant against these defendants, who are assignees of the lease, and he cannot do that: Co. Litt. 215 a; *Wright v. Burroughes* (1); Woodfall's Landlord and Tenant, 18th ed. p. 288; Foà's Landlord and Tenant, 4th ed. p. 438.

In Co. Litt. 215 a, after a reference to 32 Hen. 8, c. 34, it is stated in resolution (2) 5 "that a grantee of part of the reversion shall not take advantage of the condition," and by way of illustration the instance is given of the destruction of the condition upon the grant of the reversion of two out of three demised acres. That is exactly in point.

It may be said on behalf of the plaintiff that the rule does not apply where an act in law intervenes; that may be so possibly in the case of death, but not, as here, in the case of statutory acquisition.

[EVE J. referred to Co. Litt. 215 a, resolution 7.]

Secondly, in law the notices are bad. What is referred to as a breach was not in fact a breach at all, because the defendants were entitled to demolish, having bought for that purpose. The notices are bad on that ground, and also because they do not indicate in what way the breach is to be made good or specify what is to be done. The extent of the reinstatement should have been stated: *Fletcher v. Nokes* (3); *In re Serle* (4); *Horsey Estate, Ltd. v. Steiger*. (5) It is for the plaintiff, and not for the defendants, to specify what is to be remedied.

Next, upon the construction of the covenant to repair, we submit that, construed in the proper way, it is applicable only during the continuance of the subject-matter, and that if the houses cease to remain erected the obligation to repair ceases. The covenant was to repair the houses, but the defendants cannot do that, for the subject-matter of the demise has been materially altered, the houses having been pulled down. Under the circumstances it was not incumbent upon the defendants to do anything

(1) (1846) 3 C. B. 685.

his own statements of the law.

(2) These numbered propositions are called by Coke "divers resolutions and judgments," but are really

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(3) [1897] 1 Ch. 271.

(4) [1898] 1 Ch. 652.

(5) [1899] 2 Q. B. 79.

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in the nature of shoring up: *Lister v. Lane*. (1) The plaintiff in effect sells off part of the houses, and then as lessor asks the defendants for a new house.

Further, the plaintiff stood by and acquiesced in the demolition of the houses, and that amounted to leave and licence to the defendants to pull down, and the defendants pulled them down in their character of county council, and not as lessees.

The defendants are not liable for breaches before the assignment to them: *Mills v. East London Union*. (2) What the defendants did was in reasonable and careful exercise of their statutory powers, and they are not liable on the covenant.

Lastly, the plaintiff's proper remedy is for compensation under s. 68 of the Lands Clauses Consolidation Act, 1845: *Kirby v. Harrogate School Board* (3); *Manchester, Sheffield and Lincolnshire Ry. Co. v. Anderson* (4); *Harrison v. Southwark and Vauxhall Water Co.* (5); *President, Councillors, and Rate-payers of Colac v. Summerfield*. (6) In this last case the provisions of the local Act were substantially identical with those of s. 68 of the Lands Clauses Consolidation Act, 1845. The measure of damages is the injury to the plaintiff's reversionary interest—*Henderson v. Thorn* (7)—and not what would be enough to put the property in repair again.

P. O. Lawrence, K.C., in reply. With regard to the new point raised as to the effect of the severance of the reversion, it is submitted that where the severance has been caused by compulsion of law, and not by the voluntary act of the lessor, the condition of re-entry is not put an end to. It is apportionable: Co. Litt. 215 a, "resolution" 7, where it is stated that a condition may be apportioned by an act in law; *Winter's Case* (8); *Baily v. De Crespigny*. (9) As to the notices of breaches, it is sufficient, under the authorities, to specify the particular breaches, and it is not necessary for the person giving the notice to specify in what manner the breach is to be remedied. The cases of

(1) [1893] 2 Q. B. 212.

(2) (1872) L. R. 8 C. P. 79.

(3) [1896] 1 Ch. 437.

(4) [1898] 2 Ch. 394.

(5) [1891] 2 Ch. 409.

(6) [1893] A. C. 187.

(7) [1893] 2 Q. B. 164.

(8) 3 Dyer, 308 b.

(9) (1869) L. R. 4 Q. B. 180.

Fletcher v. Nokes (1), *Penton v. Barnett* (2), and *Horsey Estate, Ltd. v. Steiger* (3) do not militate against that view. The defendants had full notice of what they were required to do. With regard to the construction of the covenant to repair, it applies to the cottages and every part of them, and is still subsisting. The covenant to cultivate the land has been admittedly broken. As to the plea that what was done was in pursuance of statutory powers, such powers must be so exercised as not to injure adjoining land: *Geddis v. Bann Reservoir Proprietors* (4); *Nitro-phosphate and Odam's Chemical Manure Co. v. London and St. Katharine Docks Co.* (5) The measure of damages is laid down in the case of *Joyner v. Weeks*. (6)

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EVE J. Several interesting questions of law have been raised and discussed in this case.

Before dealing with them, it will, I think, be convenient if I state the facts as I hold them to have been established. [His Lordship stated the facts and the nature of the action.] To that action various defences have been raised, and two of them are, if I may say so, more substantial than the others, and raise questions which have occasioned me some anxiety. In the first place it is said that this action cannot be maintained by the plaintiff because, in fact, the conveyance by him to the council on August 13, 1906, operated as a severance of a part of the premises subject to the lease, and the condition of re-entry has gone with that severance. In support of that my attention was directed to a passage which is to be found in Co. Litt. 215 a. Section 5 (if we may give a modern name to Coke's "diversities" or "resolutions") says "that a grantee of part of the reversion shall not take advantage of the condition; as if the lease be of three acres, reserving a rent upon condition, and the reversion is granted of two acres, the rent shall be apportioned by the act of the parties, but the condition is destroyed, for that it is entire and against common right." Before I read the next paragraph I would

(1) [1897] 1 Ch. 271.

(2) [1898] 1 Q. B. 276.

(3) [1899] 2 Q. B. 79.

(4) (1878) 3 App. Cas. 430.

(5) (1878) 9 Ch. D. 503.

(6) [1891] 2 Q. B. 31.

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observe this: that the question which I am now considering is a question which in a very few years must fall into the category of entirely obsolete law, because under s. 12 of the Conveyancing Act, 1881, this matter has been dealt with by the Legislature in respect of leases granted subsequently to the passing of the Act, and it is enacted that the severance does not operate to destroy the condition; but in the present case I am considering a lease granted in 1867, and therefore a lease to which the statutory enactments in the Conveyancing Act have no application. What I have really to determine is this: whether the 7th section of the passage in Coke, which I am now about to read, extends so as, in a case arising, as this has done, under a compulsory sale, the condition may still be apportioned. Section 7 is in these terms: "By act in law a condition may be apportioned in the case of a common person; as if a lease for years be made of two acres, one of the nature of Burrough English, the other at the common law, and the lessor having issue two sons, dieth, each of them shall enter for the condition broken, and likewise a condition shall be apportioned by the act and wrong of the lessee. . . ." That point does not arise. Now it is said that this transaction which has brought about this severance is an act in law, and is therefore not one which prevents the condition being apportioned. I myself, and I have no doubt the counsel engaged in the case, have endeavoured to find authority as to what is the true meaning of the expression "by act in law." The example which Coke gives in the paragraph I have read is, no doubt, an example which all parties would agree is one of an act in law. But on the part of the plaintiff here it is urged that any act which a man is compelled to do, or does under statutory compulsion, is an act in law, and it cannot properly be limited to such matters and things as were probably the only acts in law at the time when Lord Coke was writing. I think that is probably right. It seems to me that the true foundation of the rule is this: that it was not competent for the person who had imposed or created a condition by voluntary act to apportion, and that the question whether the condition is apportionable or not depends upon the question whether the severance is brought about by the voluntary or involuntary act of the lessor. I think the authority, and as far

as I can see the only authority, which bears out that view is *Winter's Case* (1), where it is said (2): "And the lessor may not enter into these lands for the condition broken; for then he might destroy his own grant, and therefore he cannot be as to that in his former state, &c. And this distinction agreed to by all, when the change is by the act of the party himself who made the condition; and when the change is by descent, eviction, or act of law." It seems to me therefore that the real distinction that determines whether the condition is apportionable or not lies in this, whether the act under which the severance takes place is a voluntary or an involuntary act on the part of the person responsible. In this case I have no doubt that the severance is the involuntary act of the lessor. It is quite true that he, having been compelled to sell his land, was willing to facilitate the steps which were necessary in order to confer upon the county council the complete title which it was necessary for them to obtain; but all those were merely ministerial acts following upon a condition of things which had been brought about, not by a voluntary act on his part, but by the statute which had empowered the council to purchase this land compulsorily. I hold, therefore, that, so far as the defence is founded upon the plea, or upon the argument, that the action cannot be maintained by reason of the severance, the severance was an involuntary act, and that the rule to which my attention has been drawn has no application to a severance like this, brought about against the will of the lessor.

Then it was said that what was done by the council was done in exercise of or under their statutory powers, and that the proper and only remedy of the plaintiff is a claim for compensation under s. 68 of the Lands Clauses Act. In order to deal with this defence, one has to consider what the powers of the council were. The council, under their order and the statutes incorporated therewith, were entitled to purchase the strip of land constituting the front of these premises and to enter upon the land, and to demolish so much of the buildings as were on the land. Attached to that statutory power conferred upon the council was the right on the part of the owner of the property, which would be severed by the

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(1) 3 Dyer, 308 b.

(2) 3 Dyer, 309 a.

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exercise of that power, to insist that the council should acquire the whole of the property, and to him was left the choice whether the council should be limited to taking that which they were empowered to take, or whether they should be required by him to take the entirety. In this case the plaintiff deliberately elected to leave the council to take only that which they were empowered to take. Having so done, he stood in relation to that which the council had taken exactly in the same position as if he had been an owner of an independent tenement abutting on the land which the council had acquired, and the council had no more right to enter upon the plaintiff's land than they would have had to enter upon the land of any stranger to the negotiations and the arrangements which had been come to. That being the position, what they did was this, and it is quite obvious from the letters. They came to the conclusion that Mr. Piggott's cottages were not worth preserving, although Mr. Piggott had come to the deliberate conclusion that two-thirds of his cottages were worth preserving and had adopted an attitude which conveyed to the council his intention that the two-thirds should be left standing. Notwithstanding that attitude, the council elected to act upon their view rather than upon the view of Mr. Piggott, and proceeded to enter upon his land and to demolish the whole of the cottages. They now suggest that his remedy is by way of compensation, and argue that this Court, if it had been appealed to, the moment that the council were entering upon the land, to stop their so doing, would have had no power to restrain them, but would have had to send Mr. Piggott away with this advice: "You must wait; you must let them pull this down, and when you have found out how much damage you have suffered by their pulling it down, you can then claim compensation for it." I cannot adopt any such view as that. It was left to Mr. Piggott to determine whether he would have his two-thirds left standing. The council, I think, altogether misunderstood the rights which they had in this matter, and I am satisfied of this, that had Mr. Piggott appealed to this Court as soon as the attempt was made to enter upon his land and demolish that which he had deliberately elected to leave standing, this Court would have had no hesitation in granting an injunction to prevent any

such high-handed proceeding. I do not myself entertain the slightest doubt on this part of the case. The damage which might have resulted from a proper exercise of the statutory powers conferred upon the council over the land which they have acquired would be damage for which Mr. Piggott could properly only claim compensation under s. 68 of the Lands Clauses Consolidation Act of 1845; but this of which he is now complaining is not damage arising in the exercise of powers conferred upon the council by statute on the land which they have purchased, but is damage caused by acts upon land in which they had no interest whatever, and upon which Mr. Piggott in the exercise of his statutory rights had deliberately elected that the houses should be left standing. I hold, therefore, that there is no obligation on Mr. Piggott to resort to a claim for compensation, and he is entitled to maintain this action for the damage which has been occasioned to him by what I hold to be the ultra vires acts of the council.

There were other lesser but still formidable defences raised in the action. It is said that the notices of breaches of covenant were not such notices as complied with the requirements of s. 14 of the Conveyancing Act, 1881. In order to determine that, it is necessary to look first at the terms of the section itself, and next at the notices, and particularly to consider whether, having regard to the interpretations which have been put upon the section, the notices are or are not sufficient to comply with the section. Sect. 14 of the Conveyancing and Law of Property Act, 1881, says: "A right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant or condition in the lease, shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and, in any case, requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach." Now the matters in respect of which breaches are alleged are three in number. The first is

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that the defendants, having pulled down the premises, have committed a breach of the covenant to keep the property in repair. The second is that, having converted the gardens into a stonemason's yard, they have neglected to cultivate them in a husbandlike manner. The third is that, having removed the soil, they have destroyed their capacity for use as gardens. The first notice deals with the demolition and the second and third with the gardens. After stating in full the covenants to repair and cultivate, the notices proceed in these terms: [His Lordship read the three notices.]

Mr. Jessel, dealing with these notices, says that they are not sufficient, in that they do not convey to the recipient what it is that the lessor requires him to do; and he takes this further objection to the first of the three notices, that it refers to the demolition of the whole of the cottages, whereas, in fact, at this time the sale of the strip had resulted in the proper demolition of so much of the cottages as was situated upon the strip, and it was not therefore right to treat as a breach the demolition of the whole of the cottages. No doubt an action to recover possession is in the nature of a penal action; it often involves serious consequences to the lessee, and the desire of the Legislature has been, no doubt, to give the lessee every opportunity of preserving his interest and saving himself from the dire consequences of forfeiture. But, on the other hand, it was never intended by the Legislature to deprive the lessor of his right of re-entry if there had in fact been a substantial breach of the covenant, and if he had in fact given to the lessee an opportunity of remedying that breach. In this case I cannot conceive the recipients of these notices misunderstanding the cause of the plaintiff's complaint. They, having the alternative put before them of removing part of the cottages and leaving the rest standing, elected to demolish the whole, and they must have known that the demolition the plaintiff complained of was not the demolition of that portion with which they might do as they liked, but of that portion which the plaintiff had elected should be left standing. I think I should be doing an injustice to the lessor if I were to hold that the notice did not convey with sufficient particularity what his complaint was. It could not have been

that the plaintiff was asking the lessees to restore or to reinstate so much of the cottages as had been removed from land with which he had parted, and in which he had no interest. It must, I think, be said, having regard to that which was in the knowledge of all parties, that the portion of the cottages to which the notice related was that portion in respect of which the relation of landlord and tenant was still subsisting between the giver and the recipients of this notice. Mr. Jessel says the lessor did not indicate that which he required the lessees to do. That does not appear to me to be necessary, either under the statute itself or by reason of any of the decisions to which my attention has been drawn. He did indicate the matter of which he complained and the matter which he wished to be put right, and, like a prudent man, he left the lessees to find out how best they could undo that which they had done. I think the first notice was sufficient. With regard to the notices as to the non-cultivation and the removal of the soil I do not think there is any substantial objection. The covenant was, putting it shortly, to cultivate these back premises as gardens. At the time this notice was served the cultivation of the back premises as gardens had ceased, that which would have constituted the soil of the gardens had been all removed and the site converted into a hard surface upon which large blocks of stone could be moved about. The gardens had in fact been replaced by a mason's yard, and were no longer capable of being treated as the gardens which the defendants had come under an obligation to maintain. I think, therefore, the notices in each case were sufficient.

Then it was said that the covenant to repair was no longer applicable, having regard to the fact that there were two-thirds of the cottages only, instead of the cottages that were standing at the time of the lease, and having regard to the fact that these cottages, or these two-thirds of the cottages, were only two-thirds of incomplete buildings propped up and boarded up until some tenant could be found to take them and that in these circumstances it would be a hardship and an injustice to treat the covenant to repair as still subsisting. I do not take that view at all. It very often happens that when age creeps over a

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building, it is essential that more care should be expended upon its support. It is necessary that a keen eye should be kept upon the repairs which are necessary, because ruin may ensue before the repairs are done. In my view it is impossible to read this lease as limiting the covenant to so long a time only as the buildings are standing in their entirety. I think, therefore, there is nothing in that point.

The last defence is that the plaintiff acquiesced in what was being done. I am quite satisfied with the plaintiff's evidence on the matter. He said: "This was a public authority, a county council, and of course I assumed that what they were doing was within their powers. It never struck me that they would be going on to my property and pulling down that which did not belong to them, and if I gave it a thought I knew that under the conveyance they had bound themselves to reinstate all buildings which they had injured or pulled down. So far as I was concerned I was never asked for and never gave my consent to their pulling them down. I thought that they knew the law and were acting in accordance with it, and even if I had entertained any doubts about it, I should have been content to rest on their covenant to reinstate any premises that they pulled down."

In my opinion one and all of the defences fail. I think the council have been acting, no doubt with perfect good faith, under a mistaken view of what their powers were. Under these circumstances, there being no application at the present moment for relief against the forfeiture, the only order I can make is an order for the delivery up of possession to the plaintiff, and there will also be an order for mesne profits.

Then comes the question which I frankly confess is one about which I feel the greatest possible difficulty, and that is as to what damages I ought to award the plaintiff. [His Lordship reviewed the circumstances and came to the conclusion that if he awarded the plaintiff the sum of 100*l.* by way of damages he would be giving him all that he was entitled to.]

I therefore make an order for the delivery up of possession of the property, and I make an order for mesne profits. I give

the plaintiff 100*l.* damages, and I order the defendant council to pay the costs of the action.

Solicitors: *F. T. Jones; Sir Richard Nicholson, County Solicitor.*

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Water—Supply—Water Company—Special Act—School—“Domestic Purposes”—Dwelling-house used for “Business for which Water is required”—Bognor Water Act, 1891 (54 & 55 Vict. c. clxxxviii.), ss. 60, 61.

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The special Act of a water company provided (s. 60) that they should, on the application of the owner or occupier of a dwelling-house within their area of supply, furnish him with a sufficient supply of water for domestic purposes at specified rates. But by s. 61 of the Act the company could not be compelled to furnish a supply “otherwise than by agreement, where any part of such dwelling-house is used for any trade, manufacture, or business for which water is required” :—

Held, that the keeping of a boarding school for boys in which water was used for the domestic purposes of all the inmates was not carrying on a “business for which water is required” within the meaning of s. 61 of the special Act, and the occupier of the house was therefore entitled to be supplied by the water company with water to his house and premises at a rate not exceeding that specified in s. 60.

Chester Waterworks Co. v. Chester Union, (1907) 96 L. T. 566; (1908) 98 L. T. 701, discussed and followed.

SPECIAL CASE.

The plaintiff, Richard Rising Frederick, was the occupier of a house and grounds known as Aldwick Place, situate in the parish of Pagham, Bognor, in the county of Sussex, and within the area of supply of the defendants under the Bognor Water Act, 1891 (54 & 55 Vict. c. clxxxviii.), by which statute the defendants were incorporated for the purpose of supplying water within the said area.

By s. 60 of the Act the company were bound, on the application of the owner or occupier of any dwelling-house or part of a dwelling-house entitled under the provisions of the Act to demand a supply of water for domestic purposes, to furnish to such owner or occupier a sufficient supply of water for such

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domestic purposes, at rates therein mentioned, varying with the annual rack rent or value of the premises so supplied.

By s. 61 the company could not be compelled to supply water in the following cases: "(i.) To any water closet or any bath or the apparatus or pipes connected therewith respectively unless the same be so constructed and used as to prevent the waste undue consumption or contamination of the water of the company. (ii.) To any bath which shall be capable of containing when filled for use more than fifty gallons of water. (iii.) To any dwelling house, otherwise than by agreement where any part of such dwelling house is used for any trade manufacture or business for which water is required. (iv.) To any workhouse hospital or other large public institution otherwise than by meter upon such terms as may be from time to time agreed between the company and the guardians trustees managers or other persons having charge of such workhouse hospital or institution. . . ."

Sect. 63 provided that, subject to the provisions of the Act, the company might supply water for other than domestic purposes on such terms and conditions as the company might think fit, and might enter into agreements for the supply of water by measure: provided that such supply for other than domestic purposes should not at any time interfere with the supply for domestic purposes.

The facts were agreed and set out in a special case, of which paragraphs 3, 4, and 5 were as follows:—

"3. Aldwick Place, which had previously been occupied solely as a dwelling-house, was converted by the plaintiff's predecessor into a boys' school, and the plaintiff has provided in the said house accommodation for boarding approximately forty resident pupils. There is in the grounds of the said house, and detached from such house, a building which the plaintiff intends to use as a laundry in connection with the said school, for which use he requires to be supplied with water. At the present time the plaintiff has only six resident pupils, all under the age of fourteen years, but it is his intention to have as many pupils residing in the said house as the accommodation he has provided therein will enable him to have.

"4. The plaintiff's said house contains thirty-three rooms

(including dormitories, many small bed-rooms, scullery, pantry, dressing-rooms and box rooms), two fixed baths of a capacity not exceeding thirty-five gallons each, and five water-closets. It stands in grounds of an extent of nine to ten acres laid out as kitchen garden, flower garden, playing field, and ornamental grounds. In the said grounds are four stables all communicating, containing eight stalls and four loose boxes, a coach house, a coal house (formerly coach house), the said building used as a laundry, in which domestic washing only is proposed to be done for the plaintiff's family and pupils, and a building described in the lease hereinafter mentioned as a theatre, formerly used for amateur theatricals, but now used as a gymnasium. The said house and grounds were demised to the plaintiff by an indenture of lease granted by John Jackson for a term of twenty-one years from September 29, 1907, at a rent of 300*l.* per annum. The plaintiff does not require the defendants to supply him with water for use in the gardens, grounds, theatre, or any of the outbuildings other than the stables and laundry. The stables consist of a block of buildings, on the first floor of which there are living rooms, at present occupied by a servant of the plaintiff, who is employed both indoors and out of doors.

"5. The plaintiff resides in the said house with his family, and receives and educates therein the said pupils, and he receives payment for and derives profit from the education, board, and lodging of the said pupils. In addition to the said pupils, a tutor, who is in the employment of the plaintiff, resides in the said house."

The plaintiff claimed that he was entitled to a supply of water to the house, stables, and laundry, for domestic purposes (including as a domestic purpose water supplied for the use of the masters and pupils in the school, and for the washing of their clothes in the laundry), at a rate not exceeding the rate specified in s. 60 of the Act. In November, 1907, the defendants required the plaintiff to sign an agreement as to the charge for the water supply different from the rate in s. 60 of the Act. This he declined to do, but under protest paid a sum of 5*l.* 16*s.* which was demanded by the defendants. The defendants agreed to repay this sum in the event of the decision of the Court being

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against them. The question submitted for the opinion of the Court was whether the plaintiff was entitled, under the circumstances, to be supplied with water to the said premises at a rate not exceeding the rate specified in s. 60 of the Bognor Water Act, 1891. If the Court answered the question in the affirmative, it was agreed, by paragraph 11 of the special case, that judgment should be entered for the plaintiff with costs, with a declaration that he was so entitled, and for such sum as had been overpaid by him.

Lord Robert Cecil, K.C., and A. A. Bethune, for the plaintiff. The real question is whether this carrying on of the school is a "business for which water is required" within the meaning of those words in the Act. We contend that it is not. What is intended by the words is a business where water is an actual ingredient, or one of the articles or means by which the business or trade is carried on, such as the water for a swimming bath. A workhouse or a hospital is a business, and they are expressly mentioned in another sub-section. If this school is held to be a business for which water is required it will be a decision of far-reaching consequences and will exclude all boarding-houses and lodging-houses from claiming to be supplied for domestic purposes. The general policy of the Water Acts is to ensure a compulsory supply of water for all domestic purposes. That appears in the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 35, and the Waterworks Clauses Act, 1863 (26 & 27 Vict. c. 93), s. 12. If the supply is required for domestic purposes, as is admitted here, it does not matter if that supply enables a business to be carried on—it is none the less required for a domestic purpose. The real test is whether the supply is a necessity of life or an article of trade. That is the result of the authorities: *Busby v. Chesterfield Waterworks and Gas Light Co.* (1); *Liskeard Union v. Liskeard Waterworks Co.* (2); *Smith v. Müller* (3); *Pidgeon v. Great Yarmouth Waterworks Co.* (4) In the last case Lord Alverstone said that a boarding-house keeper was entitled to a supply of water for the domestic use of inmates.

(1) (1858) E. B. & E. 176.

(2) (1881) 7 Q. B. D. 505.

(3) [1894] 1 Q. B. 192.

(4) [1902] 1 K. B. 310.

In the case of *Barnard Castle Urban Council v. Wilson* (1) it was held that water supplied for a swimming bath at a school was not supplied for "domestic purposes" within s. 12 of the Waterworks Clauses Act, 1863; and Romer L.J. said that the true test was not whether the water was used for the private purposes of the occupier and his household. The point is the nature of the purpose for which the supply is required: *South Western Suburban Water Co. v. St. Marylebone Union*. (2) The last case upon the subject, and one where the special Act there in question contained practically the same words as are to be construed here, is that of *Chester Waterworks Co. v. Chester Union*. (3) That was the case of a workhouse, and it was held by the Court of Appeal, reversing Jelf J. on this point, that the section there in question did not apply to a workhouse. So here the words of s. 61 do not apply to a boarding school.

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P. O. Lawrence, K.C., and *R. Cunningham Glen*, for the defendants. The carrying on of this school is a "business for which water is required." With the exception of the last case cited, those referred to for the plaintiff have little application. By the Bognor Water Act, 1891, s. 61, the defendants are not bound to supply water for domestic purposes to any house any part of which is used for a business. The carrying on of the school is not the less a business for which water is required because the water is required for domestic purposes. Here it is part of the business to make a home for the boys. It comes within the plain words of the Act which has to be construed.

Lord Robert Cecil, K.C., in reply.

Cur. adv. vult.

Oct. 28. EVE J. The plaintiff, Mr. Richard Rising Frederick, is the lessee for a term of years, and the occupier of a dwelling-house and grounds situate in Pagham, Bognor, in the county of Sussex, within the area of supply of the defendants, the Bognor Water Company. A difference having arisen between the plaintiff and the defendants as to the terms on which the plaintiff is entitled to be supplied with water to the house and premises in his

(1) [1902] 2 Ch. 746.

(2) [1904] 2 K. B. 174.

(3) 96 L. T. 566; 98 L. T. 701.

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occupation, the question at issue has been submitted for determination by the Court by means of a special case, stated by consent of the parties, in an action commenced on January 17, 1908.

Before referring to the actual terms of the question submitted for the opinion of the Court it is necessary for me to state shortly the material facts. [His Lordship read paragraphs 3, 4, and 5 of the special case.]

Upon these facts it is admitted, on the part of the plaintiff, that he is using the house and premises for the purposes of a business. The defendants, on their part, admit for the purposes of this hearing that, upon the authority of decisions binding upon this Court, all the purposes for which the plaintiff contemplates using the water supplied must be treated as being domestic purposes.

By s. 60 of the defendant company's special Act it is enacted that the company shall, on the application of the owner or occupier of any dwelling-house, or part of a dwelling-house, entitled under the provisions of that Act to demand a supply of water for domestic purposes, furnish to such owner or occupier a sufficient supply of water for such domestic purposes at rates not exceeding the sums and percentages set out in the section.

Pausing there, it is conceded that if the Act stopped there the plaintiff would be entitled to be supplied with the water he requires upon the terms specified in the section I have just referred to. But by the next section of the Act (s. 61) the company is relieved from the statutory obligation imposed by s. 60 in certain specified cases, some of them being cases in which the relief is absolute, others being cases in which the relief is qualified, in that it extends only to the rates or terms upon which the water is to be supplied. The section is in these terms: [His Lordship read s. 61.]

The defendants contend that under paragraph (iii.) of that section they are relieved from supplying the plaintiff with the water he requires at the rates specified in s. 60, and that they are entitled to refuse to supply any water unless and until an agreement is come to between them and the plaintiff as to the terms upon which the same is to be supplied.

The plaintiff, on the other hand, contends that s. 61 has no application to his case, and he claims to be supplied under s. 60; and the question upon which the parties desire the opinion of the Court is whether the plaintiff is entitled, under the circumstances, to be supplied with water to his said house and premises at a rate not exceeding the rate specified in s. 60.

The determination of this question turns, in my opinion, upon the construction which is to be placed on the words with which paragraph (iii.) of s. 61 concludes, that is to say, the words "for which water is required."

The plaintiff's dwelling-house, as I have already said, is one of which part, if not the whole, is admittedly used for business purposes, and those purposes undoubtedly involve the consumption of water. Are these factors sufficient to stamp the house as one used for a business for which water is required, or, putting it in a way more pertinent, perhaps, to the particular facts under consideration, is the business of keeping a boys' school "a business for which water is required" within the meaning of the section I have read? A section in almost identical terms came under the consideration of Jelf J. and the Court of Appeal in the case of *Chester Waterworks Co. v. Chester Union*. (1) In that case the water company claimed a declaration that, on the true construction of their Acts, the defendants were not entitled to require the plaintiff company to supply, and the plaintiff company were not bound to supply, the Chester workhouse with water otherwise than by meter or special agreement. The section upon which the water company relied, and upon which, in Jelf J.'s judgment, the whole case turned, was in these terms: "No person shall be entitled to require, nor shall the company be bound to supply, any dwelling-house with water (otherwise than by meter or by special agreement) where any part of such dwelling-house is used for any trade or business purposes for which water is required."

Jelf J. held that the workhouse was a dwelling-house, that the whole of it, and therefore each part of it, was used for business purposes, and that all the water used there, except what was used for domestic purposes, was used for the purposes

(1) 96 L. T. 566; 98 L. T. 701.

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of the business. He came, therefore, to the conclusion that the workhouse was a dwelling-house used for a business for which water was required, and he made the declaration for which the plaintiffs asked. On appeal this part of the order was discharged, the Court holding that the section on which the water company relied had no application to the workhouse. The exact grounds upon which the Court adopted this view are not very apparent from the report, but the passages which I am about to read from the judgments of Jelf J. and Vaughan Williams L.J. do, I think, indicate that if the water supplied had been used for domestic purposes only, neither of these learned judges would have treated s. 22 as having any application, even though a business had been carried on at the workhouse.

Jelf J., after holding that the workhouse is a dwelling-house, proceeds as follows (1): "Next, is any part of this dwelling-house used for any trade or business purposes for which water is required? In the first place, I am of opinion and find as a fact that the whole of it, and therefore each part of it, is used for business if not for trade purposes for which water is required. Mr. Danckwerts says this is only true if 'business' is used in a loose general sense, and that this workhouse is not used for business purposes within the meaning of the 22nd section. But in construing similar statutes similar institutions have been held to be businesses—especially by Buckley J. in the case already cited—and if it is a business, it is used for business purposes for which water is required. If this is as a whole a business, all the water used there, except what is used for domestic purposes, is used for the purposes of the business. Moreover, I am of opinion and find as a fact that at all events (1.) the dealing with pigs, for which part of the workhouse is used, and for which water is required, is a business, even if it is not a trade; and (2.) the use of the Lancashire boilers, and the various things done by them, including the heating of the wood-chopping shed, is a business. It is, I think, not necessary for the decision of this case, and would involve a merely academical inquiry, to go seriatim through the different

purposes for which water is required in this workhouse and decide which of them is domestic, which non-domestic, and whether any of them besides those dealt with above are trade or business purposes. The distinction is almost always a question of fact (see *Busby v. Chesterfield Waterworks and Gas Light Co.* (1), *Pidgeon v. Great Yarmouth Waterworks Co.* (2), and *Barnard Castle Urban Council v. Wilson.* (3) Suffice it to say that some of the purposes are admitted to be non-domestic, and, if I am right, some of these non-domestic purposes are trade or business purposes, which brings the case within s. 22. It is to be observed that s. 22 does not use the words 'non-domestic' purposes. This may be because there is no great difficulty in adding to 'domestic' supply 'non-domestic' supply (so long as it is not trade or business supply), for example, for gardens, fountains, and so on, payment for which can be easily added, while a trade or business supply is much more difficult to combine with domestic supply as regards payment. For these reasons I think that s. 22 does apply to the present case, and that the plaintiffs are entitled to the declaration which they ask for."

I think that passage shews that the learned judge accepts the argument put forward on the part of the defendants that the important point is not the character of the house in which the water is used, but the character of the purpose for which the water is used, and that he treats the section as applicable because the water is being used, not for the inmates for their occupancy as dwellers in the house, but for carrying on the trades or businesses of dealing in pigs and firewood. Vaughan Williams L.J., after saying that s. 22, which was the section on which the water company there relied, was a very unusual section, and hazarding the opinion that it might have been introduced into the company's later Act to meet cases which would arise on the compulsory obligation of the company under an earlier Act to supply water for non-domestic purposes, goes on (4): "But I have not got to trouble myself at all really how it was or why it was that s. 22 was introduced. In my opinion s. 22 does not apply to the present case at all. The final words of

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(2) [1902] 1 K. B. 310.

(3) [1902] 2 Ch. 746.

(4) 98 L. T. 704.

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s. 22' are 'where any part of such dwelling house is used for any trade or business for which water is required.' I am of opinion that although the workhouse may use, and in my opinion does use, the water for non-domestic purposes, it is not true to say that the workhouse authorities use any part of the workhouse,—and I treat, for this purpose, the workhouse as being everything within the outside boundary of these houses—for any trade or business purposes for which water is required. That being the state of things, it is one of the points which I was referring to when I said that, so far as the water company were concerned, they had set up contentions in this action which in my opinion they could not support. Now, that being so, let us see what is the position of the guardians. Jelf J. has held that the workhouse is used for business purposes. I have already said in the course of the argument that I have been in considerable doubt about that myself. I think that the workhouse is used for the performance of statutory duties. I am quite certain—I do not like to say that I am quite certain of anything after the arguments we have heard, but I am strongly of opinion—that it would be untrue to say that the guardians carried on business in the workhouse. It is altogether a different question as to whether any business is carried on there. I have had great doubts about it, and these doubts are strengthened by having read through the Waterworks Clauses Act and the company's special Act, and when I see the extent to which the water company have to supply water free of charge or on favourable terms, where it is to be used for the benefit of the public, as in the case of flushing sewers, supplying fire plugs, and such like purposes, I am the more inclined to say that the word 'business' in s. 22 is not intended to cover the carrying out of statutory obligations imposed for the benefit of the community, but I do not know that I need differ from the conclusion arrived at by Jelf J. on this question. I do not think it is necessary for me to do so. That being the state of things, let us see how the defendants stand. I adopt the passage which I find at the bottom of p. 185 (1) of the judgment of Jelf J. where he says 'for the defendants it was contended that they are entitled to a

(1) *Sic*, but it should be 96 L. T. at p. 571.

supply for domestic purposes, though they admit that for non-domestic or trade or business purposes they will have to pay by extra payment according to statute or by meter or special agreement; and, as they cannot help admitting that some of the purposes for which water is required at the workhouse are not domestic purposes, they have to maintain, and do maintain, that there will have to be separate supplies to meet these two sets of requirements, and to be paid for separately on different bases. They do not admit that any of the purposes are trade or business purposes, and therefore they say s. 22 does not apply.' I have come to that conclusion in their favour, that s. 22 does not apply to this case, but it still leaves them in the position where it is impossible for them to deny that there are two purposes for which water is used in the workhouse, the one being domestic purposes and the other non-domestic purposes, and, according to my judgment, they are bound, and really it seems to me to be very reasonably admitted at the trial that they were bound, to pay for this non-domestic supply."

The Lord Justice, therefore, even on the footing that the workhouse was a dwelling-house used for business purposes, came to the conclusion that s. 22 did not apply, and when one turns to the order of the Court set out at the end of the report it is, I think, clear that if all the water supplied to the workhouse had been used for domestic purposes the guardians would have been entitled to a supply without any special agreement, notwithstanding that the workhouse was a dwelling-house wherein was being carried on the business of housing and feeding the poor, a business which, of necessity, involved the consumption of water.

So far, therefore, as it is applicable to the facts of this case, I think that case is in the plaintiff's favour in that it inclines to a construction of the words "business for which water is required" founded on the purposes for which the water is actually used, and not upon the concurrent existence of a dwelling-house used for business purposes, and the consumption of water for domestic purposes by the inmates of the dwelling-house, though they may be engaged in carrying on, or be themselves an element in the carrying on, of the business.

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And such a construction is certainly more in accord with the authorities upon analogous provisions in the statutes of other water undertakings. In particular the judgments in the case of *Pidgeon v. Great Yarmouth Waterworks Co.* (1) go to shew that one is not entitled to treat the user of water on business premises as a user for business purposes, unless the business is such as, in itself, to demand a user of water distinct and apart from the domestic purposes of the inmates of the premises.

In that case s. 30 of the water company's special Act imposed on the company the statutory obligation to supply water for domestic purposes at rates therein specified. By s. 32 it was provided that a supply of water for domestic purposes "shall not include" (inter alia) "a supply of water for any trade, manufacture, or business whatsoever."

The consumer was the occupier of a dwelling-house wherein he carried on the business of a boarding-house keeper, receiving persons to board and lodge who used the water of the company, but for domestic purposes only, that is to say, for cleaning, cooking, drinking, and sanitary purposes. The company contended that, under the circumstances, the water was being supplied for business purposes and ought to be paid for at a special rate. The matter came before the Divisional Court, on appeal from justices, and Lord Alverstone, in a considered judgment, after stating the facts, says (2): "Under ordinary circumstances 'domestic purposes,' in my opinion, include the use of water for the ordinary purposes of domestic life by the inmates of the house, and it is found as a fact, in the present case, that the only persons who use the water are the inmates of the house—including the persons who board and lodge in the house. Although it is true that the appellant is carrying on the business of a boarding-house keeper, he is not using the water for the purposes of his business in any proper or just sense, or in any other sense than that the water has been supplied for the domestic use of inmates of the house. If the facts in any particular case shew either that the water is not being used for 'domestic purposes' or that it is used by

(1) [1902] 1 K. B. 310.

(2) [1902] 1 K. B. 314.

persons who are not inmates of the house—who are not living in the house in the sense of being in it as ordinary dwellers—different questions may arise. In the present case all I decide is that, where it is found that there is no use of the water except for domestic purposes, and that there is no use of it by any person who is not an inmate of the house in the ordinary sense, then the company are bound to supply according to the scale for domestic purposes. I am of opinion, therefore, that our judgment should be for the appellant.”

Darling J. says (1): “I think this case would be very different if the water were used for purposes which could not accurately be described as ‘domestic’—that is, for any purpose beyond washing, drinking, cooking, and sanitary purposes within the house. If, for instance, the person who kept the house used the water for the purpose of washing clothes which were delivered to people outside, then, it seems to me, there would be a genuine case of a supply for business purposes as distinct from domestic purposes”; and Channell J. commences his judgment thus (1): “I agree. I think that the words ‘a supply of water for any trade, manufacture, or business’ mean some more direct use of the water in that business than the mere use of it for domestic purposes by the inmates of the house. The latter use is the thing which is covered by the water rate based upon the annual value of the house. It is a rough way of measuring the amount of water likely to be used for domestic purposes by the number of inmates which the house is capable of containing and accommodating. Probably one reason why water used for domestic purposes is to be paid for in that way is that domestic purposes include sanitary purposes, and it was on that ground not thought desirable that persons should have any inducement to stint the use of it. However that may be, I think that, although the supply for domestic purposes is paid for on the annual value, it does not make any difference whether the inmates of the house are guests who are entertained by the occupier at his own expense, or whether they pay for their board and lodging, or whether they are pupils whose parents pay for their board and lodging, or whether they are paupers for whom the parish

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pay. All those cases have been dealt with and decided; and it seems to me that our decision is, to a certain extent, governed by authority. As to restaurants and hotels, I thoroughly concur in what has been said. In the large majority of those cases there is beyond a doubt a use of the water for the purposes of the trade or business which could not come within the use covered by the ordinary rate based on annual value."

Then, after referring to Buckley J.'s decision in *Barnard Castle Urban Council v. Wilson* (1), he winds up thus (2): "The important part of that case, and the part which seems to support our decision, is that the learned judge obviously intended to include the pupils of an ordinary school as inmates of a house whose use, for domestic purposes only, of water, would not require a special payment beyond the ordinary water rate."

Fortified by these judgments, and by the other case to which I have referred, I am of opinion that the keeping of a boarding school, although it involves a user of the water by and for the purposes of all the inmates of the dwelling-house, is not carrying on a business for which water is required within the meaning of s. 61 of the defendant company's statute.

Accordingly I answer the question submitted in the affirmative, and, in accordance with the agreement come to between the parties and stated in paragraph 11 of the case, I make a declaration that the plaintiff is entitled to be supplied with water to his said house and premises at a rate not exceeding the rate specified in s. 60 of the Bognor Water Act, 1891. I give judgment in his favour for the amount which he has overpaid in respect of water supplied to him by the defendants, and I order the defendants to pay the costs.

Solicitors: *Hill & Aspinall, for G. W. Cutts, Bognor; Ravenscroft, Woodward & Co.*

(1) [1902] 2 Ch. 746.

(2) [1902] 1 K. B. 316.

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Trade Union—Definition—Objects of Union—Rules—Parliamentary Representation—Ultra vires—Alteration of Rules—Certificate of Registrar—Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 4, sub-s. 3 (a); ss. 13, 23—Trade Union Act Amendment Act, 1876 (39 & 40 Vict. c. 22), s. 16.

The definition of a trade union contained in the Trade Union Act, 1871, s. 23, or the amended definition in the Trade Union Act Amendment Act, 1876, s. 16, is a limiting and restrictive definition, and it is not competent to a trade union either originally to insert in its objects, or by amendment to add to its objects, something so wholly distinct from the objects contemplated by the Trade Union Acts as a provision to secure or maintain parliamentary representation.

Steele v. South Wales Miners' Federation, [1907] 1 K. B. 361, overruled on this point.

The certificate of the registrar under s. 13 of the Trade Union Act, 1871, and the regulations made by the Secretary of State pursuant to that section, of the registry of any rules or alterations of rules is not conclusive as to the validity of the proceedings taken by the society for the passing of such rules or alterations.

Rosenberg v. Northumberland Building Society, (1889) 22 Q. B. D. 373, distinguished.

THIS appeal raised the question of the legality of applying the funds of a trade union towards procuring or supporting parliamentary representation.

The Amalgamated Society of Railway Servants was a trade union established in the year 1872 and registered under the Trade Union Acts of 1871 and 1876.

The objects for which the society was established, as stated in rule I., 2, were "To improve the condition and protect the interests of its members; to endeavour to obtain and maintain reasonable hours of duty and fair rates of wages; to promote a good understanding between employers and employed, the better regulation of their relations, and the settlement of disputes between them by arbitration, or, failing arbitration, by other

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lawful means; to provide temporary assistance to members when out of employment through causes over which they have no control, or through unjust treatment; to provide legal assistance when necessary in matters pertaining to the employment of members, or for securing compensation for members who suffer injury by accidents in their employment occasioned by the negligence of their employer or of those for whom their employer is liable; to aid the young orphan children of all members; and to use every effort to provide for the safety of railway work and of railway travelling; to provide a grant of money in case of members permanently disabled or killed by accident, or when by reason of old age they cannot follow their regular employment; also to enable such members as voluntarily desire it to provide funds for their relief in sickness or temporary disablement, and for their respectable interment."

The original rules contained no reference to securing parliamentary representation by means of compulsory levies from the members, but in 1903 words were added to the objects "to secure parliamentary representation."

In 1902 a body called the Labour Representation Committee was formed for the purpose of establishing a distinct Labour group in Parliament, and to this the society became affiliated, paying an annual fee of 10s. for each 1000 members.

In 1903 and 1905 the rules of the society were recast and altered, with the result that the current rules, which came into operation in January, 1906, were, so far as material and with the exception of the words in *italics*, as follows:—

" Rule II.

" Government of the Society.

" 1. For the supreme government of the society there shall be an annual general meeting. . . . 3. The annual general meeting shall be held in October of each year. . . . 4 (*a*). The annual general meeting shall have power to amend, rescind, or make rules every three years (except an alteration is recommended by the executive committee in the interim as urgently required in the interests of the society, in which case it shall be brought before the next annual general meeting)."

“Rule XIII., Section IV.

“Parliamentary Representation.

“1. For the maintenance of parliamentary representation a fund shall be established by the society. The subscription to be 1s. 1d. per year per member, to be paid quarterly, and forwarded to the head office with the quarter's dues. 2. The objects of the fund shall be (a) to provide for representation of railwaymen in the House of Commons as the annual general meeting may from time to time determine. *All candidates shall sign and accept the conditions of the Labour Party and be subject to their whip.* (b) To contribute to the Labour Representation Committee such sums as the executive committee or the annual general meeting may from time to time direct so long as the society remains affiliated to such committee. 3. A separate account shall be kept of this fund, and the money invested in the names of the trustees of the society. . . . Such funds shall be used for the objects herein stated. 4. Candidates adopted in accordance with object (a) must be and remain bona fide members of the society. . . . 5. In the event of a candidate being selected for a constituency his election expenses shall be defrayed. . . . 6. Should a candidate be elected he shall be paid a salary of 250*l.* a year and third-class return fare to his constituency so long as he remains a member of Parliament. He shall reside at such place as the executive committee or annual general meeting may consider necessary for the proper discharge of his duties. During the time Parliament is not sitting his services shall be at the disposal of the society, as the executive committee or general secretary may direct, and be subject to the conditions laid down for organizing secretaries. 7. *The executive committee shall make suitable provision for the registration of a constituency represented by a member or members, who may be candidates responsible to and paid by this society.*”

“Rule XVIII.

“1. No new rule shall be made, nor shall any of the rules herein contained be amended, altered, or rescinded, except by the annual general meeting every third year.”

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The additions to rule XIII., section IV., 2 (a), and 7, shewn in italics, were made at the general meeting of the society held in October, 1906, but these additions were alleged to have been irregular, as there was no recommendation by the executive committee that the alteration was urgently required in the interest of the society in accordance with rule II., 4 (a).

The rules of 1905, and the partial alterations made as aforesaid in 1906, had been duly registered under the Trade Union Acts, 1871 and 1876, and a certificate of such registration had been given by the registrar. (1)

The conditions of the Labour Party referred to in sub-rule 2 (a) of rule XIII. above stated were contained in a printed document entitled "Constitution (as revised under the authority of the London Conference, 1906)," which, so far as material, was as follows:—

"Organization.

"I. Affiliation.—(1.) The Labour Party is a federation consisting of trade unions, trade councils, Socialist societies, and local Labour associations. . . .

"II. Objects.—(1) To organize and maintain a Parliamentary Labour Party with its own whips and policy; (2.) to secure the election of candidates for whose candidature an affiliated society has made itself financially responsible, and who have been selected by a regularly convened conference in the constituency.

"III. Candidates and Members.—(1.) Candidates and members must accept this constitution; agree to abide by the decisions of the parliamentary party in carrying out the aims of this constitution; appear before their constituencies under the title of

(1) The Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 13, sub-s. 5, makes the certificate of registry conclusive evidence that the regulations of the Act with respect to registry have been complied with, but the only provisions of the Act as to registry of rules are (s. 14) that the rules must provide for certain matters specified in the schedule. The regulations of 1876 issued by a Secretary of State under the Trade Union Acts,

1871 and 1876, contained the following provision:—

"The registrar, before registering the partial alteration of rules, shall ascertain that the rules of the trade union, if altered in accordance with the proposed partial alteration, will provide for all the matters required by the above-mentioned Acts to be provided for by the rules of a registered trade union."

Labour candidates only ; abstain strictly from identifying themselves with or promoting the interests of any party not eligible for affiliation ; and they must not oppose any candidate recognized by the executive committee of the party. (2.) Candidates must undertake to join the Parliamentary Labour Party if elected.

“ IV. Executive.—The executive shall consist of thirteen members, nine representing the trade unions, one the trade councils and local Labour associations, and three the Socialists. . . . ”

The said constitution further provided for (1.) affiliation fees and delegates to the annual conference, (2.) voting at the annual conference, and (3.) a parliamentary fund to be raised by contributions from the affiliated societies for the purpose of paying the election expenses of Labour candidates and maintaining members of the Parliamentary Labour Party.

The plaintiff, who had been a member of the society for some sixteen years, and was now the secretary of the Walthamstow branch, commenced this action against the society and its trustees, and alleged that rule XIII., section IV., above stated, or, alternatively, so much thereof as was partially altered in italics, and the raising by the society by compulsory subscription from the plaintiff and other members of the society, and the distribution of moneys for the purposes and in manner in the said rule appearing were not within the objects or purposes of the society or within the purposes mentioned in s. 16 (1) of the Trade Union Act, 1876, and

(1) Sect. 16 of the Trade Union Act, 1876 (39 & 40 Vict. c. 22), is as follows : “ So much of section twenty-three of the principal Act as defines the term trade union, except the proviso qualifying such definition, is hereby repealed, and in lieu thereof be it enacted as follows :—

“ The term ‘ trade union ’ means any combination, whether temporary or permanent, for regulating the relations between workmen and masters, or between workmen and workmen, or between masters and masters, or for imposing restrictive conditions on the conduct of any

trade or business, whether such combination would or would not, if the principal Act had not been passed, have been deemed to have been an unlawful combination by reason of some one or more of its purposes being in restraint of trade.”

The proviso of the Trade Union Act, 1871, left unrepealed was : “ Provided that this Act shall not affect—

“ 1. Any agreement between partners as to their own business ;

“ 2. Any agreement between an employer and those employed by him as to such employment ;

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were ultra vires the society. He further alleged that the partial alteration in italics was invalid, having regard to rule XVIII. and to the fact that the rules had been last altered or amended at the annual general meeting held in October, 1905, and he claimed a declaration accordingly; and an injunction to restrain the society and its trustees from distributing moneys for any objects other than those mentioned in s. 16 of the Trade Union Act, 1876, and in particular from acting under or distributing money for the purposes of rule XIII., section IV., as above stated. The defendants did not admit that any part of rule XIII., section IV., was not within the objects or purposes of the society, or was ultra vires, and they denied that there had been any non-compliance with the rules. They further contended that under rule II., 4 (a), and rule XVIII. the alteration in italics to rule XIII., section IV., had been duly submitted to the annual general meeting held in October, 1906, and was carried by large majorities.

Neville J., considering himself bound by the decision in *Steele v. South Wales Miners' Federation* (1) that the provision of a parliamentary representation fund was within the scope of a trade union, expressed no individual opinion upon this point, but held that the certificate of the registrar was conclusive as to the rules as amended that they had been properly passed, and dismissed the action with costs.

The plaintiff appealed.

Jenkins, K.C., Spencer Bower, K.C., and Steuart Bevan, for the plaintiff. (1.) The alterations in italics are void for irregularity. By the rules of the defendant society no alteration in the rules can be made except by the annual general meeting every third year, unless the executive committee recommend the alteration as urgently required in the interests of the society. The existing rules of the society, subject to the alterations in question, were passed at the annual general meeting held in 1905, but the alterations were passed at the next annual general meeting, and

"3. Any agreement in consideration of the sale of the goodwill of a business or of instruction in any profession, trade, or handicraft."

(1) [1907] 1 K. B. 361.

there was no recommendation by the executive committee that the alterations were required as a matter of urgency. Neville J., without expressing any opinion of his own, considered himself bound by *Dehurst v. Clarkson* (1), a decision under the Friendly Societies Act, 1834, and *Rosenberg v. Northumberland Building Society* (2), a decision under the Building Societies Act, 1874, to hold that the certificate of the registrar was conclusive that the alterations had been duly made; but these cases were decided under other Acts framed in different terms and cannot be regarded as authorities upon the effect of the registrar's certificate under the Trade Union Acts, 1871 and 1876. There is nothing in the provisions of those Acts as to registration to suggest that an alteration in the rules, otherwise invalid for irregularity, can be rendered valid by the certificate of the registrar. On the contrary, s. 16 of the Act of 1871, so far from providing that the alteration should have no binding effect until registration, which was the language used in the Friendly Societies Act, contemplates that an alteration may be in operation for a year before registration. Therefore the irregularity is not cured by the registrar's certificate.

(2.) A clause providing a fund for the maintenance of parliamentary representation is ultra vires; it is not within the objects clause of this particular society, and it is also outside the scope of a trade union as defined by the Trade Union Acts, 1871 and 1876. The plaintiff was precluded by *Steele v. South Wales Miners' Federation* (3) from taking this point in the Court below, but it is open to this Court to review that decision, and it is submitted that it was wrongly decided and ought to be overruled. It was based upon a misconception of the meaning of a trade union, and upon the view of the Divisional Court there is no reason why a trade union should not embark upon any venture whatever, provided it is otherwise lawful. The object sought to be pursued must be one of the objects named in the objects clause of the society, or incidental or ancillary thereto, and must fall within the definition of "trade union" in s. 16 of the Act of 1876, which is substituted for the definition in the Act of 1871.

(1) (1854) 3 E. & P. 194.

(2) 22 Q. B. D. 373.

(3) [1907] 1 K. B. 361.

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The promotion of a private Bill to further the avowed objects of the society might or might not be within its powers, but to maintain a member of the House of Commons is an extension of its objects not authorized either by the constitution of the society or by the Trade Union Acts. In using its funds for this purpose the society is pro tanto not a trade union, but a political organization; the society cannot legally make rules which have the effect of converting it into something different from a trade union formed for the purposes and in the manner defined by the Trade Union Acts: *Murray v. Scott* (1); nor can it use its funds for such altered purposes: *Pickering v. Stephenson*. (2) In the Trade Disputes Act, 1906, the term "trade union" has the same meaning as in the Acts of 1871 and 1876. If Neville J.'s view is correct, a trade union might add objects foreign to the objects of a trade union, and those objects might become the principal objects of the union, and yet by virtue of the Act of 1906 it might claim exemption from being sued for tort. That cannot have been the intention of the Legislature.

Peterson, K.C., Edmond Browne, H. S. Preston, and Clement Edwards, for the defendants. Long before the Act of 1871 combinations of workmen existed for arranging the terms on which work should be done; these might have been illegal on account of restraint of trade, but they were not unlawful: The Law Relating to Trade Unions, Sir W. Erle, p. 23. It is clear, too, from *Hornby v. Close* (3), *Farrer v. Close* (4), and *Reg. v. Registrar of Friendly Societies* (5) that there were numbers of trade unions whose objects were not unlawful. Then came the Act of 1871, which by s. 23, which defines a trade union, referred to combinations which but for the Act would "have been deemed to have been an unlawful combination" as being "in restraint of trade," thus unfortunately suggesting that one of its objects must have been unlawful. This definition was amended and set right by s. 16 of the Act of 1876. It is not suggested that a levy for parliamentary representation is unlawful in itself or against public policy.

(1) (1884) 9 App. Cas. 519, 538. (3) (1867) L. R. 2 Q. B. 153, 158.

(2) (1872) L. R. 14 Eq. 322.

(4) (1869) L. R. 4 Q. B. 602.

(5) (1872) L. R. 7 Q. B. 741.

With regard to the question whether rule XIII. is ultra vires of the constitution of the society, there is no ground for distinguishing between the rules and treating the object clause as equivalent to the memorandum of association in the case of a limited company. Rule I. says the objects shall be so and so, and if rule II. mentions a further object, that is not to be disregarded because it is not included in rule I., but the two must be read together. All the objects and the machinery for carrying out those objects are included in the rules, and there is power to alter the rules, including the objects clause, without qualification. This is not analogous to the case of a limited company where there is power to alter the articles but not the memorandum. In rule XIII. provision is made for parliamentary representation and for a fund to be applied for that purpose. That is as much an object as the objects in rule I. Rule XIII. sets out definitely and precisely an additional object, and the earlier rules do not preclude that.

As regards the question whether this object is ultra vires of the Trade Union Acts, it is said that s. 16 of the Act of 1876 is conclusive and final as to the objects of a trade union, but s. 2 shews that a trade union may insure its members' children, which is not an object included in s. 16, and the Trade Union (Provident Funds) Act, 1893, shews that a trade union may have a provident fund, which again is not within s. 16. Therefore the definition in s. 16 cannot have been intended as a limitation of the objects of a trade union. It was intended to be descriptive, not exhaustive. The section does not define a trade union as a combination only for the purposes specified, but it means that any combination for regulating the relations between employers and employed is a trade union. That was the view taken by Mathew J. in *Linaker v. Pilcher* (1), where it was held to be within the powers of a trade union to carry on a newspaper not for profit, but for promoting the interests of the union. So in *Chamberlain's Wharf, Ltd. v. Smith* (2) it was implied that a society which was held to be a trade union might carry on the business of a tea clearing-house; and that case also shews that all the objects need not be expressed in one rule. [*Mineral Water Bottle*

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(1) (1901) 84 L. T. 421.

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Exchange and Trade Protection Society v. Booth (1) and *Strick v. Swansea Tin Plate Co.* (2) were also cited.]

Parliamentary representation is a "benefit to members" within s. 4, sub-s. 3 (a), of the Act of 1871.

Assuming that s. 16 is a limiting section, parliamentary representation comes within it. Anything which goes to regulate the relation between masters and workmen is within the powers of the Act. It would be within the scope of the society, for example, to press for the passing of a Bill for an eight-hours day, and that might be done most effectually by having in the House a workmen's representative. The obligation of a Labour member is that he is not to commit himself to any other party and is to obey the whip of his own party. That is one method of regulating the relation between master and servant, and, therefore, it is within the purview of the Act; and if it is within the Act it is within the rules of this society. With regard to the regularity of the alterations of 1906 there is sufficient evidence to shew that the committee regarded the matter as urgent, although that word was not actually used; and in any case the certificate of the registrar is conclusive on the question of irregularity. The object of requiring the certificate of the registrar is to make the rules binding, and it is based upon a statutory declaration or affidavit made by persons having knowledge of the subject that the rules have been complied with. The language of the Building Societies Act, 1874, upon which *Rosenberg v. Northumberland Building Society* (3) was decided, is very similar to the language of the Act of 1871, and the principle of that case applies. The alterations made in 1906 must therefore be taken to have been duly made.

Jenkins, K.C., in reply, was directed to confine his observations to the question of ultra vires. It is wholly ultra vires for a trade union to turn itself into a political organization and apply any of its funds towards procuring or supporting parliamentary representation. To maintain a member in Parliament is not a "benefit" to the union within the meaning of s. 4, sub-s. 3 (a), of the Act of 1871. Some limit must be placed on the meaning

(1) (1887) 36 Ch. D. 465.

(2) (1887) 36 Ch. D. 558.

(3) 22 Q. B. D. 373.

of the word "benefit." The governing definition of trade union objects is now to be found in s. 16 of the Act of 1876, and the real and true limit of the rule-making power conferred on the committee or general meeting is that the power cannot be so exercised as to make the society a different thing from the society formed for the purposes and in the manner defined by the Trade Union Acts: *Murray v. Scott*. (1) The original objects contained no reference to parliamentary representation, and therefore they cannot be added to by a rule. Even if the maintenance of parliamentary representation might have been originally inserted as one of the objects, it could not be added under a mere power to alter the rules.

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Nov. 28. COZENS-HARDY M.R. This appeal raises questions of difficulty and great importance with reference to trade unions. The material facts are not in dispute. The Amalgamated Society of Railway Servants is a trade union which was established in 1872 and registered under the Trade Union Act, 1871. The objects for which it was established are stated in the rules. [His Lordship read the rule as above stated, and continued:—]

Nothing was said in the original rules as to securing parliamentary representation by means of compulsory levies. In 1903, for the first time, there were introduced by amendment words "to secure parliamentary representation," and in 1906 an amendment was carried requiring all candidates to sign and accept the conditions of the Labour Party and to be subject to their whip. This last amendment was not properly carried, because there was no resolution by the executive committee that the alteration was urgently required in the interests of the society. Nevertheless the amended rule was certified by the registrar. The plaintiff is and has been for sixteen years a member of the society, and as such has an interest in its funds. The action was commenced to obtain a declaration that the rule requiring payment of 1s. per member per year for parliamentary representation is invalid, and alternatively that the condition introduced in 1906 was invalid. Neville J., feeling himself bound

(1) 9 App. Cas. 538.

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by the decision of the Divisional Court in *Steele v. South Wales Miners' Federation* (1), that the provision of a parliamentary representation fund was within the scope of a trade union, and without expressing any opinion on the subject, dealt only with the second point, and he held that the certificate of the registrar was conclusive as to the validity of the addition made in 1906, and he dismissed the action with costs. On the appeal both questions have been argued before us.

It has not been contended that the dispute is one with which the Court ought not to deal.

Now it is important to observe that a trade union was not the creation of the Act of 1871. That Act dealt with the existing combinations known as trade unions. It is common knowledge that in 1871 the idea of securing parliamentary representation was not one of the objects attempted to be secured by trade unions. The Act, in s. 23, defines a trade union as follows: "The term 'trade union' means such combination, whether temporary or permanent, for regulating the relations between workmen and masters, or between workmen and workmen, or between masters and masters, or for imposing restrictive conditions on the conduct of any trade or business, as would, if this Act had not passed, have been deemed to have been an unlawful combination by reason of some one or more of its purposes being in restraint of trade: Provided that this Act shall not affect—(1.) Any agreement between partners as to their own business; (2.) any agreement between an employer and those employed by him as to such employment; (3.) any agreement in consideration of the sale of the goodwill of a business or of instruction in any profession, trade, or handicraft." The Act itself shews that the provision of benefits to members was known by Parliament to be, and sanctioned by Parliament as being, within the scope of a trade union: see especially s. 4, sub-s. 3 (a), and the First Schedule, s. 2. I see no reason to doubt that the objects of the defendant union, as originally expressed, were authorized by the Act. But it is argued that a trade union registered under and claiming the benefit of the Act of 1871, and thereby constituted not a corporation, but a species of quasi-corporation, can, in addition to the

(1) [1907] 1 K. B. 361.

objects plainly indicated in the statutory definition of trade union and in the other sections of the Act, with any provisions merely ancillary to these objects, also add any other object not otherwise illegal. Thus it may carry on a trade, subject only to the restriction as to the number of members imposed by s. 4 of the Companies Act, 1862, or it may devote its funds to the promotion of any political or religious party, or to the encouragement of any athletic sports, and it will none the less be a trade union with all the rights, privileges, and disabilities of a trade union. I am unable to accede to this argument. The definition contained in the Act of 1871, or the amended definition in s. 16 of the Act of 1876, is a limiting and restrictive definition. In my opinion it is not competent to a trade union either originally to insert in its objects or by amendment to add to its objects something so wholly distinct from the objects contemplated by the Trade Union Acts as a provision to secure parliamentary representation. Trade unions comprise members of every shade of political opinion, and I cannot think it was the intention of the Legislature that it should be competent to a majority of the members to compel a minority to support by their votes, still less by their subscriptions, political opinions which they may abhor, under penalty not only of being expelled from the union, and thus losing all chance of benefit, but also the risk, and in some cases the very serious risk, of not being able to find employment in their trade in consequence of the refusal of trade union members to work with non-union members. This is the conclusion which I have reached by the mere consideration of the Acts of 1871 and 1876. But I think it is permissible to refer to the Trade Disputes Act, 1906, which applies to every trade union under the earlier Acts. It seems to me extravagant to suppose that the immunities and exemptions conferred by that Act can have been intended to apply to any business which a trade union might add to what I may call strictly trade union purposes. In short, that Act confirms the view that a trade union registered under the earlier Acts must be a body with limited objects.

I am unable to agree with the judgments of Darling and Phillimore JJ. in the case of *Steele v. South Wales Miners'*

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Federation. (1) They seem to have been largely influenced by the omission of any reference to "benefits" in the definition of trade union. But, as I have pointed out, the Act itself says that a trade union may provide benefits. I cannot concur in their view that there is nothing to prevent a trade union from having a great number of additional objects besides. It follows that, in my opinion, it is not competent for a trade union to provide for the maintenance of parliamentary representation by means of a compulsory levy.

This really disposes of the appeal, for it was not contended that the registrar's certificate could be conclusive as to a rule which the Court holds to be ultra vires. But as the subordinate point upon which Neville J. based his judgment is important, I think it right to say that I am unable to agree with that judgment. Sect. 13, sub-s. 5, of the Act of 1871 makes the first certificate of registration of a trade union conclusive evidence that the regulations of the Act with respect to registration have been complied with. This is the only provision making a certificate conclusive evidence. Sect. 13, sub-s. 6, authorizes the Home Secretary from time to time to make regulations respecting registration under the Act, and generally for carrying the Act into effect, but I do not think it would be competent for the Home Secretary by regulation to make the registrar's certificate of any alteration of the rules conclusive evidence of the validity of the alterations. However that may be, the regulations which have been made do not even purport to make the certificate conclusive evidence. On the construction of these Acts I am clearly of opinion that it would be wrong to hold the certificate to be conclusive. The learned judge seems to have considered himself bound by the decision of the Court of Appeal in *Rosenberg v. Northumberland Building Society* (2) upon words which are not identical, though they may be similar, in the Building Societies Acts. With great respect to the learned judge, I do not think it is right to treat a decision on a different Act as a binding authority on the construction of this Act. I can find no such difficulty in construing the Act of 1871 as would drive me to such a dangerous argument as one based upon analogy.

(1) [1907] 1 K. B. 361.

(2) 22 Q. B. D. 381.

There was a further point raised in argument, namely, that even if the maintenance of parliamentary representation might have been originally inserted as one of the objects of the trade union, it could not be added under the mere power to alter the rules. There is a good deal of force in this argument, but I desire to express no concluded opinion upon it.

It is unnecessary for me to add that my judgment in no way depends upon the fact that the Socialist Party rather than any other political party is that which it is sought to benefit by the amended rule.

The appeal must be allowed. There must be a declaration that rule XIII., section IV., is invalid, and that the same is not binding upon the plaintiff and other members of the society, and there must be an injunction restraining the defendants from levying from the plaintiff and other members of the defendant society, and from applying the moneys of the society for any of the purposes mentioned in rule XIII., section IV. The respondents must pay the costs of the action and of the appeal.

FLETCHER MOULTON L.J. A preliminary question arises in this case as to what in truth were the rules of this trade union during the material period. It is common ground that the addition to rule XIII., section IV., 2 (a), which has given rise to the present dispute, did not form a portion of the rules which were adopted by the annual general meeting in the year 1905. By rule XVIII. of those rules, which relates to "alteration of rules," it is provided as follows: "No new rule shall be made, nor shall any of the rules herein contained be amended, altered, or rescinded, except by the annual general meeting every third year." The addition to which I have referred purports to have been passed by the annual general meeting in the year 1906, which accordingly was not a meeting which had a general power of varying the rules. *Prima facie*, therefore, the suggested variation would have no validity; but it is pointed out by the respondents that under rule II., which relates to the "government of the society," it is provided by 4 (a) as follows: "4 (a). The annual general meeting shall have power to amend, rescind, or make rules every three years (except an alteration is recommended by the executive

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committee in the interim as urgently required in the interests of the society, in which case it shall be brought before the next annual general meeting)"; and they claimed that this amendment comes under the above exception. It is difficult to reconcile rule XVIII. and rule II., but in my opinion it is not necessary to undertake this task in order to decide the question that arises in the present case, for there is no justification in fact for the suggestion that the alteration in question was recommended by the executive committee as urgently required in the interests of the society. A committee of that kind must act by resolution, and no resolution of urgency was proposed or carried, nor does the speech in which the amendment was proposed at the annual general meeting by a member of that committee give any countenance to the view that the matter was treated by the executive committee as one of urgency. It is therefore impossible to support the contention that the amendment of rule XIII., section IV., 2 (a), was validly passed.

Counsel for the respondents contended, however, that any defect in the passing of the amendment is cured by the fact that it was registered on November 8, 1906, and on this ground the learned judge in the Court below has decided in the respondents' favour. The argument in support of this contention is of an extraordinary character. It is scarcely contended that the language of the Acts regulating trade unions is such as to render the registration of a rule conclusive as to its having been properly made, but it is argued that in the case of *Dewhurst v. Clarkson* (1), which related to friendly societies, the Court of Queen's Bench in the year 1854 decided that in the case of friendly societies the certificate of the registration of a rule was conclusive as to the rule having been regularly made, that the decision in *Dewhurst v. Clarkson* (1) was followed in the Court of Appeal in the case of *Rosenberg v. Northumberland Building Society* (2), which related to building societies, and that therefore this Court should come to a similar conclusion in the case of trade unions. Inasmuch as the statutes relating to each of these classes of societies are different in structure and language, and the obligation and effect of the registration of the

(1) 3 E. & B. 194.

(2) 22 Q. B. D. 373.

rules must turn entirely on the language used in those statutes with regard to it, I am at a loss to understand how the decision of a Court in a case relating to any one of the three cases can depend on decisions of the Courts with regard to any other. An actual examination of the cases cited confirms this view. In *Dewhurst v. Clarkson* (1) the relevant clause of the statute provided "That all rules, alterations, and amendments thereof, from the time when the same shall be certified by the said barrister" (i.e., the person corresponding to the registrar in the present case) "shall be binding on the several members and officers of the said society, and all other persons having interest therein"; and the decision of the majority of the Court was based on the presence of this provision. No such language is to be found in the statutes regulating trade unions.

In the case of *Rosenberg v. Northumberland Building Society* (2) the Court of Appeal had to deal with an Act in which the words above quoted were not to be found. I am unable to arrive at any satisfactory conclusion as to what particular provision in the relevant Act was supposed by the eminent judges who decided the case to be the equivalent of the very definite language used in the Act relating to friendly societies which I have quoted above. I can myself find nothing in the Act more clearly approaching it than s. 20 (Building Societies Act, 1874), which reads as follows: "Any certificate of incorporation or of registration, or other document relating to a society under this Act, purporting to be signed by the registrar, shall, in the absence of any evidence to the contrary, be received by the Court, and by all Courts of law and Equity and elsewhere, without proof of the signature; and a printed copy of the rules of a society, certified by the secretary or other officer of the society to be a true copy of its registered rules, shall, in the absence of any evidence to the contrary, be received as evidence of the rules." It is not necessary for me to say whether, apart from the authority of that case, I should have been of opinion that such language would render a certificate of the registrar conclusive as to the validity of the alteration of a rule. It suffices to say that neither the language of the above section nor any

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equivalent language is to be found in the Acts relating to trade unions.

I am therefore of opinion that this question must be decided by the language of the Trade Union Acts as *res integra*, and that there is no decision which binds or entitles the Court to give to the provisions of those Acts anything but their natural meaning. When considered from this point of view, I can see nothing which makes the fact of registration effective to give validity to an alteration of a rule which has not been validly passed according to the rules which govern the society. On the contrary, it is clear to my mind that the Act contemplates that the actual rules of the society may differ at any particular moment from the registered rules, inasmuch as the only obligation to give notice to the registrar of alterations in the rules is to be found in s. 16 of the Act of 1871. This section provides that a general statement of the receipts, funds, effects, and expenditure of every trade union registered under the Act shall be transmitted to the registrar before the 1st day of June in every year, and then follows a provision as under: "Together with such general statement there shall be sent to the registrar a copy of all alterations of rules and new rules and changes of officers made by the trade union during the year preceding the date up to which the general statement is made out, and a copy of the rules of the trade union as they exist at that date." These provisions appear to me to shew clearly that the Legislature intended alterations in the rules, validly made, to take effect from the moment of their making, quite independently of whether or not notice of them had been sent to the registrar, and this appears to me to be incompatible with the idea that the certificate of the registrar as to the rules of a society can be requisite or effective to give them validity. It is true that under regulations made by the Home Secretary, under the provisions of s. 13, sub-s. 6, of the Act of 1871, power is given to any seven members of the trade union to apply for the registration of alterations, and such application must be accompanied by a statutory declaration by an officer of the society that in making the alteration the rules of the said trade union have been duly complied with. But statutory authority is not given to these

rules by the Act, nor is there in the sub-section authorizing the making of these rules anything which would entitle the Home Secretary to interfere with the provisions of the Act or the rules of the trade union with regard to the proceedings necessary to give validity to an alteration, nor can I even find in the rules themselves any indication that the validity of an alteration was intended to be affected by or dependent on any such application for registration or the registration following thereon. On the contrary, it appears to me that the rules are only practical regulations for the purpose of securing a higher degree of accuracy in the register, a result which under ordinary circumstances would be attained by that which they direct. Had it been intended that registration should give validity to alterations whether validly made or not, there would, in my opinion, have been some definite provision to that effect, and I should have expected it to be accompanied by some provision for the registrar ascertaining whether or not the provisions of the Act and the rules of the trade union had been properly observed in the case of alterations which he is called upon to register. No such provision is to be found, and it is easy to conceive of two contradictory applications being made to the registrar, each with the requisite formalities in case of a dispute as to whether a rule had or had not been validly altered, and so far as I can see he would be compelled to register both without being able to decide which of the parties applying was in the right.

Two sections in the Act of 1876 merit reference in connection with this point. Sect. 13 deals with changes of name and amalgamations. It is there provided that where a trade union has changed its name, or where two or more trade unions have amalgamated, notice shall be sent to the central office established by the Friendly Societies Act, 1875 (with similar formalities to those required in the case of alterations of rules), and registered there, and the section goes on to provide that "until such change of name or amalgamation is so registered the same shall not take effect." Similarly we find that by s. 6, which deals with trade unions carrying on business in any one of the three countries, England, Scotland, and Ireland, other than that in which its registered office is situated, copies of the amendments

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of rules shall be sent to the registrar of such country to be recorded, and adds that "until such amendments of rules be recorded the same shall not take effect in such country." In both these cases the Legislature specifically gives to registration a statutory effect and makes it essential to the validity of the acts to which it relates, and the absence of any such provisions in the case of the ordinary registration of alterations of rules in the country in which the trade union is originally situate raises a strong presumption that it was not intended that registration there should be either necessary or sufficient for the validity of alterations of rules.

Inasmuch, therefore, as I can see no justification for departing from the language of the Acts regulating trade unions, and can find no warrant in that language for holding that registration is conclusive evidence that an alteration has been validly made, I hold that in order to alter a rule the alteration must have been validly passed by the society in accordance with the actual rules of the union regulating the matter as they existed at the time, and that, if this has not been done, no registration can give validity to the alteration. It follows that the alteration in question to rule XIII., section IV., 2 (a), never became part of the rules of the trade union. The same consideration appears to me to apply to the additional clause 7 of rule XIII., section IV., which was, however, not separately argued before us. The plaintiff is therefore, in my opinion, entitled to the declaration secondly asked for in his statement of claim.

But this decision does not dispose of the whole of the matters in issue in this case. A far more serious question remains behind, namely, whether the rules in question relating to the formation and employment of funds for what is termed in those rules "the maintenance of parliamentary representation" are ultra vires of the society and therefore void.

The facts with regard to this portion of the rules seem to be as follows. Taking the rules as they at present stand, i.e., in the form in which they were passed in 1906, the objects of the society purport to be formally set out in rule I., 2, and this contains no reference to parliamentary representation. It is also admitted that when the society was first formed neither its

objects as specifically set forth nor the rules which were made for the purpose of carrying out these objects made any reference to parliamentary representation, and that this remained so until the year 1900. It is only since that date that the rules have been altered so as to include provisions relating to it. On considering the language of the First Schedule to the Act of 1871 I have little doubt that the intention of the Legislature was that the whole of the objects for which a trade union has been or is to be established should be specifically set forth as such as a condition precedent to registration, and that the rules properly so called were intended to indicate the manner in which it was proposed to accomplish those objects. It follows that, strictly speaking, parliamentary representation was not in the year 1906 one of the objects of the society, and was therefore not then a fit subject for rules. But this distinction between "objects" and "rules" is only a formal matter which could be cured by re-drafting the paragraphs purporting to enumerate the objects of the society, unless we should hold that the original objects of a trade union cannot be added to at a later date, which I am not at present prepared to do.

If, therefore, "maintenance of parliamentary representation" could lawfully be added to the list of objects set forth in rule I., 2, I shall take it as though the equivalent had been done by the introduction of rule XIII., section IV., and the other rules that relate to the payments to the parliamentary fund.

Can, then, a trade union lawfully have as one of its objects the "maintenance of parliamentary representation," using these words in the sense in which they are used in the rules of this trade union? This must depend on the definition of a trade union adopted by the Legislature. It is to be found in s. 16 of the Act of 1876 and is as follows: "The term 'trade union' means any combination, whether temporary or permanent, for regulating the relations between workmen and masters, or between workmen and workmen, or between masters and masters, or for imposing restrictive conditions on the conduct of any trade or business, whether such combination would or would not, if the principal Act had not been passed, have been deemed to have

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been an unlawful combination by reason of some one or more of its purposes being in restraint of trade."

The first question that presents itself is whether this is an inclusive or an exclusive definition, or, in other words, whether it simply means that any combination which has among its objects any such purposes as those enumerated in the above definition is a trade union, or whether it means that to be a trade union the objects should substantially be solely such as those specified in the definition or otherwise recognized by the Trade Union Acts.

This question came before a Divisional Court in the case of *Steele v. South Wales Miners' Federation* (1), and Darling and Phillimore JJ. seem to have there held the view that s. 16 is not a limiting section at all, and that so long as some of the objects of a society are such as are specified in the definition it may add to them any other objects which are not of an unlawful character without ceasing to be a trade union; and accordingly in that case they decided the specific question with which we are now dealing in favour of the power of a trade union to levy a contribution "to provide funds wherewith to pay the expenses of returning and maintaining representatives to Parliament."

I cannot agree with the view that any combination that has among its objects the regulation of such matters as are referred to in the statutory definition is ipso facto a trade union and within the purview of the Acts relating to trade unions. The Legislature did not create the name for the purposes of the Acts. It was at the time a well-known term, connoting combinations of a known type formed for objects and purposes which were well recognized. For instance, s. 4 of the Act of 1871 and other parts of the Acts shew that the Legislature recognized that the provision of benefits to the members was one of such purposes. Insurance is, within certain limits, similarly shewn to be another. Reading the Acts as a whole, one has no difficulty, therefore, in arriving at the conclusion that the definition in s. 16 is not intended to exclude collateral or ancillary purposes of such well-known types, and it appears to me immaterial whether we consider that their inclusion arises from their being in the

(1) [1907] 1 K. B. 361.

contemplation of the Legislature means for regulating the relations specified in the definition, or whether we take it that they are impliedly brought in by the use of the well-known word "trade-union" with all its associations. But I cannot think that the Legislature intended that objects not at the time recognized as trade union objects, and not coming within the objects specified in the definition, might form part of the legitimate objects of a trade union within the purview of the Acts. One strong reason for coming to this conclusion is the following. I see no reason to think that the Legislature has altered its conception of a trade union since the date when the Act of 1871 was passed (excepting that it has removed the limitation which was contained in the original definition, which excluded trade unions, which would not have been unlawful at common law), and therefore I feel justified in taking into consideration not only the Acts of 1871 and 1876, but also the Trade Disputes Act of 1906, in considering the proper interpretation to be put on the definition. In examining these Acts I find that trade unions are placed in a wholly exceptional position in the eye of the law. Sect. 4 of the Act of 1871 is one example of this, and s. 4, sub-s. 1, of the Trade Disputes Act of 1906 is another and a still more striking example. This latter section frees trade unions from liability in all actions in tort. Now I cannot bring myself to believe that the Legislature intended to allow a combination whose purposes were to a considerable extent trading or political propagandism or any other of the lawful purposes which one could mention, which have nothing to do with the relations of masters and workmen, to obtain for itself such a statutory immunity by including within its purposes some regulations such as those adopted by genuine trade unions. In my opinion a trade union for the purposes of these Acts must substantially be a trade union as defined, and nothing more, always bearing in mind that there are important collateral or ancillary purposes, such as benefits to members, insurances, &c., which for the reasons I have given above fairly come within the meaning of trade union purposes. For example, if an association of masters of less than twenty in number were to form a trading combination, they would not, in my opinion, be exempt from actions of tort

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merely because their resolutions aimed at the restriction of their competitors' trade in a manner which would before the Act of 1871 have been unlawful at common law by reason of being in restraint of trade. Nor would a combination a substantial part of whose objects was political be protected from actions of libel merely because it also sought to regulate the relations between masters and masters or between masters and workmen.

Now there is no doubt that in the year 1871 the maintenance of parliamentary representation was no recognized object of trade unions, and I can see no justification for saying that it comes within the definition of the objects of trade unions contained in s. 16 of the Act of 1876. I am therefore of opinion that it cannot legally be made an object of a trade union, and that it was *ultra vires* to add this to the original objects of this trade union. It follows that it was *ultra vires* to make rules for the collection of funds for the purpose from the members by way of compulsory contribution.

But there is another and more far-reaching objection to the legality of the rules of this society as they stand according to the contention of the defendants. One has only to look at the proposed additions to rule XIII., section IV., to see that the object of the parliamentary fund is to procure members of Parliament who shall be bound to vote in a prescribed manner, and that it is in consideration of their undertaking so to vote that the funds of the society are to be expended in procuring their election and in supporting them in Parliament. Any such agreement is, in my opinion, void as against public policy. This is best seen by taking the simplest case. Suppose that A. contracts with B. that he will pay the election expenses of B. and support him while in Parliament provided that B. will engage to vote as A. directs. To my mind it is clear beyond contest that such an agreement would be void as against public policy, and this none the less though A.'s motives were perfectly pure and his intention was solely to use the power he thus obtained for the public good. The reason why such an agreement would be contrary to public policy is that the position of a representative is that of a man who has accepted a trust towards the public, and that any contract, whether for valuable consideration or otherwise, which binds him to exercise

that trust in any other way than as on each occasion he conscientiously feels to be best in the public interest is illegal and void. This deep-seated principle of law is the basis of the illegality at common law of bribery at parliamentary elections, for the power of voting for a representative is also a trust towards the public. Now to my mind it can make no difference whether such a contract be that B. shall vote as A. tells him or as any body of third persons may decide. Every such agreement is tainted with the vice of the trustee binding himself contractually for valuable consideration that he will exercise a trust in a specified manner to be decided by considerations other than his own conscientious judgment at the time as to what is best in the interests of those for whom he is trustee. And it is no answer to say that before or at the election he openly avowed his intention to be thus contractually fettered. The majority who elected him may be willing to permit it, but they cannot waive the rights in this respect of the minority. By our Constitution a representative is chosen by the vote of the majority, and however little the political views of the elected member coincide with those of the minority, they cannot complain. But that election is the election of a representative, and, whoever be chosen, their right remains that he shall be a representative, and not one who has contractually fettered himself in discharge of the duty of representative which he has accepted as regards the public, and not only as regards his own supporters. It is no excuse for a breach of trust towards any one of the cestuis que trust that many, or even a majority, of the cestuis que trust are willing to permit it. They may waive their own rights as against the trustee, but they cannot waive the rights of others.

Applying these principles to the present case, I am of opinion that the rules as contended for by the defendants would imply the employment of the funds of the society for purposes contrary to public policy. The two additions to rule XIII., section IV., proposed are as follows: "Clause 2 (a).—All candidates shall sign and accept the conditions of the Labour Party and be subject to their whip." New clause 7.—"The executive committee shall make suitable provision for the registration of a

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constituency represented by a member or members, who may be candidates responsible to and paid by this society." The conditions of the Labour Party bind members when elected to abide by the decision of the parliamentary party in carrying out the aims of its constitution, and the new clause 7, set out above, treats the members of Parliament when elected as responsible to the society. Both of these are, in my opinion, inconsistent with the position of one who has accepted the public trust implied by becoming a representative in Parliament, and to use the funds of any society for the purpose of procuring the election of any candidate so bound contractually, or to support him in Parliament on condition of his performing such contract, is in my opinion illegal. Any other view of the fundamental principles of our law in this respect would to my mind leave it open to any body of men of sufficient wealth or influence to acquire contractually the power to exercise that authority to govern the nation which the law compels individuals to surrender only to representatives, that is, to men who accept the obligations and the responsibility of the trust towards the public implied by that position.

For these reasons I am of opinion that the proposed rules are illegal, and that the enforcement of subscriptions to raise funds to carry them into effect and the employment of the existing funds of the society for that purpose would be wholly illegal acts. I agree, therefore, that the plaintiff is entitled to the whole of the relief which the Master of the Rolls has formulated in his judgment.

FARWELL L.J. This appeal raises the question whether trade unions can lawfully apply any of their funds in promoting the election, paying the election expenses, and providing for the maintenance of a member of Parliament who is to be bound to vote according to the directions of a body formed for advancing the interests of a class, in the present case of workmen, but which might equally well be of employers. It involves the grave constitutional question whether a trade union can by fine and expulsion compel its members to subscribe for such a purpose, and whether such a purpose is not in itself illegal. The

question is of the utmost importance, involving not only the relation of the trade unions, with their extraordinary privileges, to the public, but also the power of a majority of a trade union to compel an unwilling minority to dispose of their subscribed and invested funds and to pay levies in future for objects of which they may heartily disapprove. Neville J. has expressed no opinion on this, but has merely followed the decision of the Divisional Court in *Steele v. South Wales Miners' Federation*.⁽¹⁾ We are asked to overrule that case. That case was decided in favour of the power of the union on the ground that the definition of "trade union" in the Acts of 1871 and 1876 was not intended to limit the powers of the union, but was merely descriptive, with the result that a trade union can do anything that any individual can do. The reason given is that benefits to members of trade unions are not expressly mentioned in s. 16. The attention of the Court was not called to the question of illegality. I am quite unable to agree with this decision.

Prior to the passing of the Act of 1871 a trade union, as such, had no legal status. It was, speaking generally, an association of wage-earners for the purpose of improving or maintaining the conditions of their employment. It combined the objects of a friendly society with those of a trade guild. In the former capacity it gave relief to its members when out of work from sickness or accident or on strike, that is, "dispute" and "unemployed" benefits, as they have been called, and in the latter capacity it bargained with employers on behalf of all its members, and, with the influence of a united body, for higher wages, shorter hours, and the like. There was also the further question, in which the masters were only indirectly interested, of "overlap" or "encroachment" of trade on trade, as of the bricklayers and the slaters or the boilermakers and the engineers. These and such as these were the proper functions of a trade union in 1871. But both before and after that Act all the individual members of such an association might also form themselves into a co-operative society under the Industrial Acts, or a political society or the like, but they would do so as

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individuals, not as a trade union; or they might, if less than twenty, trade as partners, but such partnership would be outside and independent of their position as a trade union. The defendants' argument confuses the trade union with the members composing it. It is impossible to assimilate the position of an association that had no legal status with that of an individual who has all the ordinary rights and duties of citizenship, and it is even more impossible to adopt the respondents' argument that a trade union can do anything that any number of men not exceeding twenty can do, for this leaves out the consideration that nineteen of them cannot bind the twentieth to any course except by agreement, and until the terms of the agreement are known it is impossible to determine its meaning.

In 1871 the Legislature legalized these associations, and included employers as well as workmen, but refrained from incorporating, and forbade them to have recourse to Courts of law for the purpose of enforcing the usual trade union agreements. Inasmuch as the scheme of the Act was to remove the disabilities attaching to combinations for the restraint of trade, but to leave the members thereof to settle their own affairs without power to resort to law, s. 4 is important as shewing the extent and purview of the dealings within the contemplation of the Act as being trade union dealings, and sub-s. 1 of that section recognizes the distinction that I have already pointed out between the agreements of members of a trade union as such and the agreements of the same individuals as members of some other association or body. The first four sections of the Act give protection to all trade unions whether registered or unregistered, and the Act then proceeds to make provision for the registration of trade unions with resulting advantages not given to unregistered societies. The defendant union is registered, and we are therefore concerned only with registered unions. The Act is framed on the lines of the Companies Act, 1862, and after excluding by s. 5 the application of that Act and of the Friendly Societies Acts and the Industrial Acts, it provides by s. 6 that any seven or more members of a trade union may, by subscribing their names to the rules of the union, &c., register the union with a name and the exclusive right thereto. Such union can

buy and sell land not exceeding one acre, and personal estate without limit of amount, for the use and benefit of such trade union and the members thereof. Trustees have power to bring and defend actions, &c., touching such property, treasurers and officers are bound to account, annual returns have to be made to the registry of the assets and liabilities and receipts and expenditure of the union, and the union must have rules in the scheduled form by which, amongst other things, it is required to state the whole of its objects, and provision is made for its amalgamation with other unions and its winding up. A registered trade union is thus a statutory legal entity, anomalous in that, although consisting of a fluctuating body of individuals and not being incorporated, it can own property and act by agents. Now when the Legislature gives statutory existence to such a body and with such privileges, a definition clause is absolutely essential, and accordingly we find that the definition clauses in both Acts are intended to be true definition clauses, that is, precise statements of the essential nature of trade unions, and are not expressed to be mere clauses of inclusion. The words are “ ‘ Trade union ’ means,” not “ includes.” Further, the Act of 1906 adopts by reference the same definition clause, and I think, therefore, that we are bound to consider s. 16 by the light of all three Acts. It is plain that a combination regulating the relations between workmen and workmen in s. 16 of the Act of 1871 includes such relations as have already been mentioned in s. 5, and therefore includes those benefits which the Divisional Court thought were not within the definition. The defendants’ contention, that the mere assumption of the name of trade union with some one rule that is in restraint of trade can possibly give to the persons assuming it the extraordinary privileges of the Acts of 1871, 1876, and 1906, is extravagant.

It is then argued that, even if this be so, the acts complained of here are within the powers of a trade union as defined by the Act. It is said that the object of the union is to improve the condition of its members, that, for example, an eight-hours day would so improve it, and that such a result can be better achieved by legislation than by striking. I disclaim

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all intention of expressing any opinion on the merits of the claim. Whether the eight-hours day is or is not beneficial is for the union to decide, not for the Court, but the argument by which the claim is supported and the means by which it is proposed to carry it out are questions for the Court. The argument that it will improve the condition of the members proves too much. I will take two illustrations at the opposite ends of the scale. It can hardly be denied that it would improve the condition of the members of any community that they should be induced to abandon anger, hatred, malice, and all uncharitableness, and to live in peace and harmony as Christians, yet it could not be contended that the majority of a trade union, whether Church of England, Roman Catholic, or Dissenting, could compel the minority to pay for the services of a clergyman of the same denomination as the majority to inculcate these doctrines. Or, again, it is better that the members should drink good beer at a fair price rather than bad beer at a high price, but no one could say that the thirsty majority of a trade union could compel the rigid total abstaining minority to contribute to the expense of taking and keeping open licensed premises with a union official as manager to supply the members with liquors. It is impossible to construe Acts like these by the light of arguments founded upon broad generalities. When it is said, for instance, that trade unions may carry on a trade or run a newspaper, it must be remembered that, if that be so, traders or newspaper proprietors could register themselves as trade unions. There is nothing to shew in such a case that the trade union must come first in time or be the chief *raison d'être* of the association. Seven or more employers can, of course, register under the Act, but they register themselves, not their trade or business. If a trade union could carry on any trade, any trader could easily comply with the requirements of the Act and register as a trade union. No one ever supposed, when the Companies Act was passed in 1862, that it would enable the formation of one-man companies with the evils resulting from the power of an individual to trade in substance at the risk of his own creditors, and to lend himself money on floating debentures, taking priority over their claims. But the consequences of such

a construction as is here contended for of the Trade Union Acts would be far more serious. For example, if a trade union as such can run a newspaper, the proprietors of *The Times*, for instance, can register themselves as a trade union and libel all and sundry with perfect impunity. It is said that Mathew J. decided that the union could do so in *Linaker v. Pilcher*. (1) That case was decided under somewhat unfortunate circumstances and cannot be regarded as correct. It was heard while the judgment in the case of *Taff Vale Ry. Co. v. Amalgamated Society of Railway Servants* (2) was reversed in the Court of Appeal and before it was affirmed in the House of Lords, and the proposition that the trustees of the union could be sued for such a tort as libel of which not they but the trade union were guilty cannot stand, whatever might be the case if the tort were the result of the use of the union's property vested in them, so as to cause, for example, nuisance by obstructing ancient lights. As to the rest of the case, if the paper was merely a sheet sent to the members containing reports of their proceedings, and the like, I have no objection to make to it; but if it was a newspaper in the ordinary sense of the word, I am of opinion that it was wrong, and that the reason given in the judgment, that it was carried on at a loss and not at a profit, is not a sound one.

Leaving now the general for the particular reasons given by counsel, it is said that the objects of the union can be better obtained by parliamentary action than by strikes. Assume that it is so; it does not follow that all means of inducing Parliament to act are therefore legalized. It is clear that the most direct and effective mode, namely, of compelling all the members of the union on pain of expulsion to vote for a particular candidate, would be illegal. In my opinion it would also be illegal for a landlord to compel his tenants, by means of covenant and proviso for re-entry, to subscribe to the funds of the particular party that he supported, or for an employer to make his workmen, on pain of dismissal, subscribe to his party funds; and it follows that in my opinion it is equally illegal for a trade union to compel their members to allow their funds to be applied,

(1) 84 L. T. 421.

(2) [1901] 1 K. B. 170; [1901] A. C. 426.

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and themselves to subscribe, as is proposed in the present case, and all the more so because their power is greater, as many of the members who preferred their principles to their union would have to suffer greater sacrifices by giving up the benefits incident to a long membership in an old-established and wealthy union. If this were not so, the position of the working man is indeed parlous. His own trade union may compel him to pay for A.'s return and maintenance in the House, his master's trade union may compel him to pay for B., and he himself may desire that C. should represent him. Such compulsion is utterly opposed to the whole theory of representative government. I do not rest my opinion upon any statutory provision, but on the broad general ground stated in Blackstone, vol. i. p. 178: "As it is essential to the very being of Parliament that elections should be absolutely free, therefore all undue influences upon the electors are illegal, and strongly prohibited." And point is added to this by the reasons already given by him at p. 171 for limiting the franchise. He says there: "If it were probable that every man would give his vote freely, and without influence of any kind, then, upon the true theory and genuine principles of liberty, every member of the community, however poor, should have a vote in electing those delegates, to whose charge is committed the disposal of his property, his liberty, and his life. But, since that can hardly be expected in persons of indigent fortunes, or such as are under the immediate dominion of others, all popular states have been obliged to establish certain qualifications; whereby some, who are suspected to have no will of their own, are excluded from voting, in order to set other individuals, whose wills may be supposed independent, more thoroughly upon a level with each other." The learned author then quotes from Locke on Government a passage relating to interference by the Executive, and I will read the following passage, which appears to me to be applicable to the present case (Locke, Of Civil Government, § 222): "Thus to regulate candidates and electors, and new-model the ways of election, what is it but to cut up the government by the roots, and poison the very fountain of public security? For the people, having reserved to themselves the choice of their *representatives*, as the fence to

their properties, could do it for no other end, but that they might always be freely chosen, and so chosen, freely act, and advise, as the necessity of the common-wealth, and the public good should, upon examination, and mature debate, be judged to require. This, those who give their votes before they hear the debate, and have weighed the reason on all sides, are not capable of doing. To prepare such an assembly as this, and endeavour to set up the declared abettors of his own will, for the true *representatives* of the people, and the law-makers of the society, is certainly as great a *breach of trust*, and as perfect a declaration of a design to subvert the government, as is possible to be met with." Freedom of choice is the very corner stone of representative government, the withdrawal of which would destroy the whole fabric. It is the justification by which legislative interference with the individual freedom of free men in a free country is reconciled with such freedom, namely, that the interference is their own act, because the Act is passed by the representatives of the whole body of free and independent electors freely chosen. Any compulsion, whether physical, spiritual, or temporal, which makes a man subscribe to and support a representative against his will and judgment is as inconsistent with those principles as is similar compulsion to vote, and, indeed, may in these days, when voters are so numerous, be of even more pernicious effect because more far-reaching. It is not enough to say that a man's vote has not been influenced. It is also necessary for his freedom that he shall not have been coerced into supporting by money or otherwise the candidate whom he wishes to oppose. It is really ludicrous to suggest that this choice is confined to voting on the day of the poll. A man who throughout desires the return of A., and yet wittingly and willingly assists to return B., by subscription or otherwise, stultifies himself and ranks in point of intelligence with the man who votes at the poll for both of the opposing candidates. To constrain a man to such imbecility is both to injure and to insult him, and is, besides, an injury to the community in preventing freedom of election. Unless freedom of choice is to be reduced to an absurdity it must extend to the whole conduct of the elector towards the candidate from

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beginning to end. It was suggested that the present case is similar to a political club like the Reform or the Carlton, but there is no real analogy. Those clubs do not claim the status or privileges of trade unions. There is nothing to prevent all the Radicals in the defendant union from forming themselves into one political club, all the Conservatives into another, all the Labour men into a third, and all the Socialists into a fourth; but such clubs will not be trade unions, nor could any one of them which happened to have a majority over the others in the union use its powers as such majority to coerce the others into subscribing or allowing union funds to be applied to the party organization of the majority. A political club may, of course, by its rules make its membership conditional on adherence to a particular party, but it is otherwise with a non-political club. For instance, the Conservative or Liberal majority of the Athenæum could not compel such of its members as belong also to the Reform or the Carlton, as the case may be, to subscribe to the Conservative or Liberal Party funds on pain of expulsion from the Athenæum.

But there is a further objection to the proposed application of the defendants' funds. Their members are very numerous, scattered over many constituencies and comprising electors and non-electors. The defendants' scheme is in effect to subsidize candidates and maintain them if returned to Parliament for the purpose of representing exclusively the interests of railway workmen. In other words, certain constituencies are to be disfranchised by substituting for a member representing them a paid delegate bound to put the interests of those who pay him before all other considerations. But this is so utterly unconstitutional that no Court of law can possibly regard money subscribed for such a purpose as money subscribed for a lawful purpose. To return to Blackstone, at p. 159 there is this passage: "Every member, though chosen by one particular district, when elected and returned, serves for the whole realm. For the end of his coming thither is not particular, but general; not barely to advantage his constituents, but the *common* wealth. . . . And therefore he is not bound, like a deputy in the united provinces, to consult with, or take the advice

of, his constituents upon any particular point, unless he himself thinks it proper or prudent so to do." The same principle is enforced by Burke in one of his Bristol speeches, in vol. iii. (ed. of 1815) of his collected works at p. 19: "To deliver an opinion is the right of all men; that of constituents is a weighty and respectable opinion, which a representative ought always to rejoice to hear; and which he ought always most seriously to consider. But *authoritative* instructions; *mandates* issued, which the member is bound blindly and implicitly to obey, to vote, and to argue for, though contrary to the clearest conviction of his judgment and conscience; these are things utterly unknown to the laws of this land, and which arise from a fundamental mistake of the whole order and tenour of our constitution. Parliament is not a *congress* of ambassadors from different and hostile interests; which interests each must maintain, as an agent and advocate, against other agents and advocates; but parliament is a *deliberative* assembly of *one* nation, with *one* interest, that of the whole; where, not local purposes, not local prejudices ought to guide, but the general good, resulting from the general reason of the whole. You chuse a member indeed; but when you have chosen him, he is not member of Bristol, but he is a member of *parliament*. If the local constituent should have an interest, or should form a hasty opinion, evidently opposite to the real good of the rest of the community, the member for that place ought to be as far, as any other, from any endeavour to give it effect." I do not, of course, suggest that a member may not bind himself by promises to his constituents to support a particular party or particular measures, but his primary duty is to his country, and he cannot bind himself at law by any promise in abnegation of such duty. If a man has been elected on promises given without due consideration, it is a matter for his own honour to determine whether he should resign or what course he should adopt, but no promise made by him to vote in any given way has any legal validity. The promise would be nudum pactum because given without consideration, or bad because given for an illegal consideration. The passage already read from Locke applies with great force to this. No one could attempt to defend an individual millionaire who subsidized members on the terms that they voted

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for a particular measure, or generally according to his directions, and the case is certainly not improved by multiplying the subsidizers by seven or by thousands, or by registering them as a trade union. If the payments were made from time to time as payments for each vote as it was given, the transaction would be too scandalous for any attempt at a defence, and I fail to see any difference between payment by the year and payment for each vote. Service is service, whether the wage be paid by the month or by the job. These observations are, of course, limited to the case before the Court, of the intrusion of strangers into a constituency. I see no reason why the electors who desire a particular candidate, who may be a poor man, to be their member should not subscribe for his expenses and his maintenance in Parliament, provided always that they do not attempt to buy his votes. He cannot be deprived of his independence, nor can he free himself from the great duty to his country that he undertakes by becoming a member.

Another point was argued by the appellant on which also he is, in my opinion, entitled to succeed. The alteration of the rules was clearly irregular, but it is said that the irregularity is cured by the registrar's certificate. I am of opinion that this is not so. The only provision in the Act making the certificate conclusive is in s. 13, sub-s. 5, but this s. 13 deals with two distinct matters—(1.) the registry of the trade union, and (2.) of the rules thereof. Sect. 5 refers to the former only. Sect. 16, which refers to alterations in the rules, merely provides for their being sent to the registrar at the end of the year with the yearly accounts. The regulations in Appendix B provide for the delivery of certificates of registration of such alterations, but do not make them conclusive, and I doubt whether there is any jurisdiction so to make them under the power given by s. 13, sub-s. 6. The cases cited were decisions on different statutes with very different words to those in the Trade Union Act and are of no assistance here. Mr. Jenkins made another point, namely, that the schedule requires that the whole of the objects of the union shall be set forth in the rules before they are registered, that the Act distinguishes between objects and rules, and that there is power only to alter rules, not

objects, and he says that parliamentary representation is an object so entirely foreign to the original objects of this union that, even if legal, it cannot be added so as to transform the character of a trade union of thirty years' standing and to divert funds accumulated for benefit purposes to parliamentary contests and the sustenance of members of Parliament. I express no concluded opinion on the point, as it has not been fully argued, but merely say that it well deserves serious consideration, if it ever becomes necessary to decide it. I am therefore of opinion that the rules relating to parliamentary representation are ultra vires, and, further, that the purposes for which the money of the union is proposed to be applied are illegal, and, consequently, that the defendants must be restrained from making any such application of their funds.

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Solicitors: *C. T. Wilkinson; Pattinson & Brewer.*

W. C. D.

In re SPURLING.

Practice—Lunacy—Mental Infirmity—Stockholder—Dividends—Receiver—Accrued Dividends—Form of Order—Transfer into Court—Bank of England—Indemnity—Lunacy Act, 1890 (53 & 54 Vict. c. 5), ss. 116, 146, 333.

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Where an order is made by a Master in Lunacy under s. 116 of the Lunacy Act, 1890, appointing a receiver, on completing his security, to receive all dividends and arrears thereof to which a person suffering from "mental infirmity" is or may become entitled, "including dividends accrued and to accrue due before lodgment upon the funds to be lodged pursuant to the lodgment schedule," and directing the lodgment in Court of certain Bank of England securities, the Bank must pay all arrears of dividends accrued before lodgment direct to the receiver and not into Court.

The Bank may safely act upon an order in this form, and in so doing is clearly within the indemnity provided by ss. 146 and 333.

In re Browne, [1894] 3 Ch. 412, discussed and applied.

AN order of June 16, 1908, made by one of the Masters in Lunacy under s. 116 of the Lunacy Act, 1890, appointing a receiver and intituled "In the matter of John Henry Forster Spurling a person of unsound mind not so found by inquisition

C. A. and In the matter of the Lunacy Acts 1890 and 1891," was as
1908 follows:—

SPURLING, " 1. Upon the certificate of the Masters in Lunacy that he has
In re. completed his security the said Charles Compton Lanchester is
authorised in the name and on behalf of the said John Henry
Forster Spurling to receive and give a discharge for:—

" (A) The rents and profits including all arrears thereof of
the freehold hereditaments and premises belonging to the said
John Henry Forster Spurling with power to let and manage the
same for any periods not exceeding three years and to pay all
proper outgoings in respect thereof.

" (B) All dividends interest and income and all arrears
thereof respectively to which the said John Henry Forster
Spurling is or may become entitled *including dividends accrued and
to accrue due before lodgment upon the funds to be lodged pursuant
to the lodgment schedule hereto*" (the words in italics having been
added in October following by the Master in consequence of some
correspondence with the Bank).

The order then proceeded to deal with certain sums of cash, to
provide for the maintenance of the said John Henry Forster
Spurling, and directed the lodgments in Court to be made as
directed by the lodgment schedule.

The lodgment schedule contained, inter alia, three Bank of
England securities consisting of 800*l.* India 3½ per cent. stock and
500*l.* Bank of England stock standing in the name of "Amelia
Jessie Spurling deceased," the said John Henry Forster Spurling
being registered as sole executor of her will, and 400*l.* Consols
standing in the name of the said John Henry Forster Spurling.
The receiver completed his security in due course.

The Bank objected to this order even as amended on the
ground that it directed the dividends accrued and to accrue due
before lodgment in Court to be paid to the receiver and not into
Court with the stock, and some further correspondence passed
between the Bank officials and the officials in Lunacy, with the
result that, as the Bank persisted in its objection, a notice of
motion on behalf of the said Charles Compton Lanchester, the
receiver, and dated November 5, 1908, was served on the Bank
that the Lords Justices sitting in Lunacy would be asked for an

order that the Bank might comply with the said order of June 16, 1908, (1.) by lodging in Court the sums of India $3\frac{1}{2}$ per cent. stock, Bank of England stock, and Consols specified in the lodgment schedule to the said order, "and (2.) by paying to the applicant the arrears of dividends on the said stocks already accrued due before the date of lodgment notwithstanding that the said order does not direct that the dividends on the said stocks accrued due at the date of lodgment should also be lodged in Court."

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By a letter of November 25 the Bank also raised further objections to this order, the nature of which appears from the arguments.

Buckmaster, K.C., and *Fischer Williams*, for the motion. It is clear from *In re Browne* (1) that the Master in Lunacy has jurisdiction to make an order appointing a receiver of dividends on Bank of England securities in a case like the present, and that under ss. 133 and 146 of the Lunacy Act, 1890, the Bank may safely act on such order. The original objection by the Bank to this order is based on the statement by Lindley L.J. in *In re Browne* (2) that "The practice has been to order the stocks, &c., to be transferred into Court, and then to let the receiver obtain the dividends from the Paymaster-General," but if this case is examined it is clear that there is jurisdiction to appoint a receiver of dividends only; this would include dividends accrued at the date of the order. It is a needless expense to pay these accrued dividends into Court with the stocks, as it involves a second application to the Paymaster-General to get them out again. *In re Browne* (1), when examined, does not justify the objection of the Bank. A form of order was settled in April, 1904, in *In re Shewell* (3) for cases

(1) [1894] 3 Ch. 412.

(2) *Ibid.* 417.

(3) The material portions of the order of April 29, 1904, are as follows, the words in italics having been added by amendment in the presence of the Bank:—

"That upon the certificate of the Masters in Lunacy that she has completed her security the said (receiver)

be authorised to exercise as regards the estate of the said Algernon Shewell the powers of a committee of the estate as in the case of a person of unsound mind so found by inquisition, and among other things to receive and give a discharge for all dividends interest and income and all arrears thereof respectively."

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of this kind; the Bank was a party when the amendments dealing with this very point were made. It is said that the decision of the Court in *In re Auchmuty* (1) has re-established the practice alleged to have been laid down by *In re Browne*. (2)

[COZENS-HARDY M.R. I was a party to that decision and I do not see that it has anything to do with this case.]

Since this notice of motion was served other objections have been raised by the Bank to this order, which appear to be groundless after *In re Browne*. (2) The Bank ought not to have refused to comply with this order, and should therefore pay the costs of this application.

Upjohn, K.C., and *Howard Wright*, for the Bank. After the decision in *In re Browne* (2) the practice used to be to pay accrued dividends into Court with the stocks. After *In re Shewell* (3) this practice was modified, but the decision in *In re Auchmuty* (1) restored the practice as laid down by *In re Browne*. (2) The objection of the Bank to the present form of order is well founded.

[COZENS-HARDY M.R. We could not, if we would, upset the practice as settled by *In re Shewell* (3), to which the Bank was made a party before the amendment was made.]

There are further objections to this order. The order is merely an authority to the receiver to receive; it is not a mandatory order on the Bank to pay to any particular person. Before the Bank can obtain a proper indemnity under the Act there must be a mandatory order in terms directing it to pay some one, to do something, or permit something to be done. Further, this order is only a conditional order; it is conditional upon the certificate of the Master in Lunacy that the receiver has completed his security. There should be a separate or further order after the security is completed. The Bank is only entitled to act upon "clean" and direct orders, and unless there is an order of this kind the Bank does not get the indemnity provided by s. 333.

[COZENS-HARDY M.R. The question of the Bank's indemnity

(1) (1908) 99 L. T. 462. (2) [1894] 3 Ch. 412.

(3) See note (3), ante, p. 201.

was raised in *In re Browne* (1) and decided in favour of the Bank.]

The question there was rather one on the effect of the word "lunatic" and not on the form of an order like the present. It is desired by the Bank that this question of indemnity should be expressly raised now. The Bank would not be protected under this order by s. 146, for it would not be paying dividends "in pursuance of the Act," nor by s. 333, which deals with "lunatics" only.

As a matter of convenience the Bank ought not to be required to look at more than one order, or to find out if the certificate of the Master in Lunacy has been given; the Bank is entitled to have what have been described as "clean orders," that it may not be hampered in the enormous business it carries on: *In re Shortridge*. (2) [They also referred to ss. 144 and 145 of the Lunacy Act, 1890.]

COZENS-HARDY M.R. This application is rendered necessary by the refusal of the Bank to act upon an order made by the Master in the matter of John Henry Forster Spurling.

The only point raised upon the correspondence which took place before the notice of motion was given was that the Bank objected to the order because, in addition to directing the lodgment in Court of certain Bank stock and other securities under the control and management of the Bank, it also directed the dividends accrued and to accrue due before lodgment in Court to be paid to the receiver. That point has really not been pressed upon us by Mr. Upjohn, and I think for a very good reason, because this Court in 1904, in the presence of the Bank, in the case of *In re Shewell* (3) deliberately inserted words to this effect, and the Bank has repeatedly acted upon it since. Quite apart from that authority I cannot bring myself to doubt that the objection of the Bank on this point is a wholly unreasonable one.

The case of *In re Browne* (1), of which we have heard so much, asserted in plain language that there was jurisdiction to order

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(1) [1894] 3 Ch. 412.

(2) [1895] 1 Ch. 278.

(3) See note 3), ante, p. 201.

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the appointment of a receiver of dividends on stock in the Bank ; but the Court went on to say, with what seems to me to be admirable good sense, that when you are dealing with corpus belonging to a lunatic, although there may be jurisdiction to say that the Bank shall keep the stock in their own books and keep on paying the dividends to the receiver, yet it is more usual and on the whole better that the stock itself should come into Court, but they said distinctly that there may be special reasons why that should not be done.

Here the corpus is ordered to be lodged in Court, and all that is asked for is that the dividends which have accrued due or will accrue due prior to the lodgment in Court shall be paid to the receiver. Why that should not be done really passes my conception. In ordinary course the only effect of lodging these dividends in Court would be that an application would have to be immediately made for payment out to the receiver of these dividends so paid in, and I think we ought to be very careful to avoid the necessity for the needless costs which would be incurred in many lunacy matters if the Bank were allowed to insist on any such objection as this. I hold that the objection is untenable, and it has been so decided by this Court in *In re Shewell*. (1)

There are other objections to the order which were only raised in a letter of November 25, and they, I suppose, must be treated seriously. It has been argued that the order appointing a receiver (in a form which has been usual for the past eighteen years so far as my experience goes, and not merely usual, but I may say universal, in lunacy matters) is so framed as not to give protection either to the Bank or to anybody else acting upon the faith of the order. One objection is based on the ground that the order is merely that upon the certificate of the Master that the receiver has completed his security he is authorized to give a discharge for, amongst others, these dividends, and that there is no mandatory order upon the Bank directing it to pay them to him, and we are asked to hold that the effect of that is that the Bank will not get any indemnity under s. 333 because there are no mandatory words, but merely an authority to

(1) See note (3), ante, p. 201.

the receiver to receive. That turns really upon s. 333 of the Act. In the first place, this is an order purporting to be made under the Lunacy Act, 1890, and s. 333 of that Act is: "This Act, and every order purporting to be made under this Act, shall be a full indemnity and discharge to the Bank and every other company and society and their respective officers and servants, and all other persons respectively, for all acts and things done or permitted to be done pursuant thereto, or pursuant to the rules under this Act, so far as relates to any property in which a lunatic is interested either in his own right, or as trustee or mortgagee, and it shall not be necessary to inquire into the propriety of any order purporting to be made under this Act relating to any such property or the jurisdiction to make the same." We are told that an order purporting to be made under the Act and authorizing the receiver to receive and give a discharge for these dividends does not fall within the language of that section. That is a proposition which I cannot for a moment listen to. I think that the case falls plainly within the meaning of s. 333; and, if it is necessary to refer to it—I do not think it is—I think it is also covered by s. 146.

I have made this statement of my own views because Mr. Upjohn seemed desirous that the Bank should have an express decision upon this point; but I do it rather under protest, because I feel that this very point was distinctly and deliberately decided in *In re Browne* (1), and I think it is almost impertinent of me to express my own view that the decision of those very eminent judges was perfectly correct. In my view there is absolutely nothing in this contention.

The other objection is, if anything, more extraordinary still. It is said that the Bank is not bound to act upon a conditional order and that the authority is conditional upon security having been completed. The certificate of the Master that security has been completed is forthcoming and has been produced. This really is asking us to upset what has been the settled practice in lunacy for at least eighteen years—for in fact, I think, much longer than that—I think I may say for at least forty years, for it goes back to the Act of 1862—and the effect of doing that

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which we are asked to do here might be to render the dealings of all mankind as to receivers appointed under the Lunacy Act open to question and doubt. I entirely decline to do that.

I think all the objections taken by the Bank to this order are without foundation and unjustifiable, and consequently that the Bank must pay the costs of this application.

FLETCHER MOULTON L.J. I am of the same opinion.

I have great sympathy with the position of the Bank, which has to manage enormous funds in the shape not only of Consols, but of various other stocks which are under its charge, and the Court has always been willing to listen to any suggestions of the Bank as to the formalities of orders relating to such funds which affect it so that its path may be made easier. But, on the other hand, the Bank must not abuse this willingness of the Court to listen to suggestions from it as to the procedure to be followed, and I think that the points which are raised on the present occasion are perfectly unreasonable.

With regard to the question whether the indemnity clauses do not apply because this person is not a lunatic so found by inquisition, I need only say that the point has been expressly decided in *In re Browne* (1) in the only way in which, to my mind, it could be decided by this Court, and that decision is, of course, binding upon us.

The two other objections, however, which are raised by the Bank are really the object of the present proceeding. In the first place the Bank claims that it ought not to be required to obey a conditional order, or in other words that, where an order of a most definite kind appointing a receiver is made conditional on his completing his security, the Bank ought not to be required to ascertain whether he has completed his security before the Master, but may neglect and refuse to obey such an order. To admit the substantiality of such a contention would be to go contrary to the whole practice not only of the Lunacy Court, but of every branch of the Supreme Court. Appointments of receivers are generally—not always—on the completion of and on giving proper security, and there cannot be the slightest

(1) [1894] 3 Ch. 412,

excuse for the Bank saying that it is entitled to require that a further order should be made after security has been completed. We should never listen to such a demand in the case of any other person who was required to pay over money to a receiver.

The other contention is still more extravagant. It is that it is not sufficient for the Bank to have even an absolute order appointing a receiver, but that there must be a mandatory order on the Bank to pay over particular sums to a particular person; otherwise, it is suggested, the Bank will not get the benefit of s. 333, the indemnity section. If the Bank does not get the benefit of the indemnity section in such circumstances, nobody else does, and the consequence is that we are asked to hold that every debtor is entitled to demand the production of a mandatory order that his particular debt should be paid over to the receiver. Such a suggestion appears to me to be nothing short of an absurdity. In this case the actual stocks are scheduled to the order, and the Bank knows that it has to pay the arrears of dividends on those stocks to the receiver. It has a clear intimation of what its duty is, and that duty arises under the order of the Court, and the Bank must obey such an order like anybody else.

I am of opinion that these objections are unreasonable and that the argument founded on them is untenable.

FARWELL L.J. I agree. I was a member of the Court that decided *In re Auchmuty* (1), and I am unable to understand how it has any bearing in support of the contention now put forward by the Bank.

With respect to the objection that the order appointing the receiver is conditional upon the certificate of the Master being produced, it comes to this, that the Bank is asked to be good enough to look at two documents instead of one; one is the order, and the other the certificate. This really has no analogy to the case of *In re Shortridge* (2), where the Bank was asked to do something on the appointment of new trustees and to look into some matter which required some legal knowledge and a

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(1) 99 L. T. 462. .

(2) [1895] 1 Ch. 278.

C. A. knowledge of the facts as well. Here you have two official
1908 documents. Moreover, this is in accordance with the practice
SPURLING, which has been followed by the Bank without demur for
In re. years.

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With regard to the question of indemnity I am really at a loss to understand how it can be said that *In re Browne* (1) does not govern this case. In that case there was a clear expression of opinion on this point, as has been already stated by the Master of the Rolls. We are not considering whether, apart from the Lunacy Act, 1890, the Bank would be compelled to pay over these dividends or not. In the case of *Wood v. Hitchings* (2) the then Master of the Rolls, Lord Langdale, says: "Is there any case in which the Court has refused to appoint a receiver pending a litigation in the Ecclesiastical Court, on the ground that there was no legal personal representative? Has this Court ever allowed a person who admits a sum of money to be due from him to an estate, to dispute the right of the receiver to collect it?" and the counsel for the legatees who opposed the appointment of a receiver said: "The Bank of England would not pay and would be justified by the Acts of Parliament, and the receiver would have no means of compelling payment from the debtors to the estate who might dispute the debt." It may or may not be so; but the question here is whether the provisions of s. 333 of the Lunacy Act, 1890, are not intended to give a perfectly good discharge to the Bank when it does pay. I cannot conceive that when the Legislature authorized this Court to appoint a receiver to receive and give a discharge for dividends, and declared, by s. 333, "This Act, and every order purporting to be made under this Act, shall be a full indemnity and discharge to the Bank and every other company and society and their respective officers and servants, and all other persons respectively, for all acts and things done or permitted to be done pursuant thereto," it intended to leave any possibility of liability to account with regard to any person who acted in reliance on the order of the Court which authorized a receiver to give a discharge for money payable to him under the order. There is no sort of dispute here as to the identity of the sums,

(1) [1894] 3 Ch. 412.

(2) (1840) 2 Beav. 289, 294.

because those appear as dividends on specified stocks mentioned in the schedule.

It appears to me that all the objections are absolutely unsubstantial. I think that the Bank has rather presumed on the indulgence of the Court. Speaking for myself, I am always anxious to assist in cases of real difficulty; but I do not think this is a real difficulty. The objection ought not to have been made at all.

The order was eventually made in the terms of the notice of motion, the Bank being ordered to pay the costs.

Solicitors: *Church, Rackham & Co.; Freshfields.*

W. C. D.

LIVERPOOL AND NORTH WALES STEAMSHIP COMPANY, LIMITED *v.* MERSEY TRADING COMPANY, LIMITED.

[1907 L. 1602.]

Pier—Unauthorized Construction—Nuisance—Public Right of Access—Rates for Passengers—Rates for Vessels “mooring”—Recovery of Rates paid under protest—Foreshore—Crown Grant—Harbours, Docks, and Piers Clauses Act, 1847 (10 & 11 Vict. c. 27), ss. 2, 25, 33, 47—General Pier and Harbour Act, 1862 (25 & 26 Vict. c. 19), ss. 6, 13, 17, 19—Crown Lands Act, 1829 (10 Geo. 4, c. 50), s. 73—Crown Lands Act, 1866 (29 & 30 Vict. c. 62), s. 20.

A provisional order of the Board of Trade, confirmed by a special Act of Parliament, authorized a company to construct a pier and provided that when a certificate of the due construction of the pier had been given by the Board the company might levy certain rates on passengers using the pier and on vessels “mooring” within limits defined by the order. In 1900 H., who had acquired the pier from the assigns of the liquidator of the company, discovered that the pier had not been constructed within the limits of deviation fixed by the order, and that the certificate of the Board of Trade had not been given; and thereupon, with the view of perfecting his title, he obtained from the Crown a grant of the foreshore and bed of the sea on which the pier stood. In 1907 the plaintiffs ran passenger steamers to the pier, and the M. Company, to whom H. had leased the pier, refused to allow the plaintiffs’ steamers to come alongside the pier except on payment of a lump sum

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for the season for passenger rates, and also "mooring" rates. The plaintiffs brought an action for an injunction to restrain the M. Company and H. from excluding them and their passengers from using the pier and for repayment of rates paid under protest :—

Held, that H. was now by virtue of grants from the Crown owner of the soil and the structure upon it, and was entitled to say that the pier had not been built under the powers conferred by, and was not subject to the liabilities imposed by, the provisional order; that it was his pier, and whether it was a nuisance or not (as to which the Court expressed no opinion) he was in a position to exclude the plaintiffs from it.

Decision of Neville J., [1908] 2 Ch. 460, affirmed.

CROSS APPEALS from a decision of Neville J. (1)

By a provisional order made in 1892 and confirmed by a special Act of Parliament the Colwyn Bay Pier Company, Limited, were authorized to construct a pier as described in the provisional order and delineated on the deposited plan, with power, with the consent of the Board of Trade, to deviate the same laterally to any extent not exceeding the limits of deviation marked on the plan. The company might receive certain rates and tolls, including rates "on vessels mooring or anchoring within the limits specified in the order," when a certificate had been obtained from the Board of Trade that all consents and approvals of the Board required under the order had been given. With the written consent of the Board the company might sell or lease their undertaking and the lessee or purchaser might exercise the powers conferred by the order, and the company might borrow up to 8000*l.* on the security of the rates and tolls.

The company bought from a private owner some land above the foreshore, and on this they constructed the base of and the approaches to the pier. In November, 1892, they mortgaged the land to their bankers, who in 1896 sold it to one Horton.

In 1893 the company obtained a grant from the Board of Trade, acting on behalf of the Crown, of the portion of the bed of the sea below the foreshore which formed part of the site of the pier: The portion of the foreshore which formed the site of the remainder of the pier was acquired by the company in 1894 and 1896 under two leases from the Commissioners of Woods and Forests, acting on behalf of the Crown, for terms of eighty years respectively.

(1) [1908] 2 Ch. 460.

In June, 1897, the company went into liquidation, and in November, 1897, the liquidator, with the consent of the Board of Trade, sold and conveyed the company's undertaking and pier to parties who in November, 1898, sold the pier and undertaking to Horton and assigned the two leases by his direction to a trustee for him.

Early in 1900 Horton completed the pier by erecting a landing-stage at the seaward end thereof, but shortly afterwards for the first time discovered that, although the pier started from the right point, it had been erected for the greater part of its length entirely outside the limits of deviation; that the Board of Trade had not sanctioned any deviation; that the time allowed for the construction of the pier had expired; and that for these reasons the Board had not given a certificate. Thereupon he caused the two leases to be surrendered to the Crown, and in February, 1901, obtained from the Commissioners of Woods and Forests, acting on behalf of the Crown and under the powers of the Crown Lands Act, 1829, a grant of that part of the foreshore and bed of the sea on which the pier was constructed.

In June, 1907, Horton leased the pier to the Mersey Trading Company and let them into possession. They raised the rates for passengers and also informed the Liverpool and North Wales Steamship Company that their steamers would not be allowed to come alongside the pier to land or embark passengers except on payment of a fixed rental of 450*l.* for the season. The last-named company refused to pay and commenced this action against the Mersey Trading Company and Horton, claiming an injunction to restrain the defendants from excluding the plaintiffs, their servants, and the passengers by their steamers from the pier, and from preventing the plaintiffs from landing or embarking passengers at or from the pier, and repayment of all sums unlawfully claimed by and paid to the defendants. On a motion for an interim injunction no order was made, but cross undertakings were given under which the plaintiffs were until judgment or further order to pay tolls on the assumption that the provisional order was valid and operative. Under this undertaking the defendants claimed to be entitled to charge the

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C. A. plaintiffs' steamers with mooring rates when they called at
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The plaintiffs by their statement of claim alleged (as the fact was) that no list of rates had been affixed at the pier pursuant to s. 47 of the Harbours, Docks, and Piers Clauses Act, 1847; that the defendants were not, nor was either of them, legal owners or lessees of the pier; that all the sums demanded and received as rates or tolls from the plaintiffs by the defendants were illegally demanded; that by reason of the defendants' wrongful acts aforesaid the plaintiffs were unable to use the pier; and they claimed relief as above stated.

The defendants by their defence alleged that the plaintiffs knew all the facts relating to the pier; that the pier was the private property of the defendant Horton, and that the plaintiffs were not entitled to use it except upon payment of the remuneration that the defendants required; that under the circumstances the plaintiffs were estopped from asserting that the defendants were not entitled to the pier and to charge the rates and tolls they had charged; that at any rate the plaintiffs were bound after the order of July 31, 1907, to pay the same rates and tolls as would have been payable on the assumption that the provisional order was valid; alternatively they submitted that the plaintiffs were not entitled to use the pier or the approach thereto without paying the rates and tolls provided for by the provisional order respecting the pier, or charges based upon the said rates and tolls; and the defendant company counter-claimed for payment of the sums due to them from the plaintiffs for passenger tolls and mooring rates.

Neville J. held that the pier, being an unauthorized structure, was an obstruction to navigation and a public nuisance, and consequently that no statutory rights arose in favour of either the defendants or the public; that the plaintiffs as individual members of the public could not elect whether they would treat the pier as a nuisance or adopt it as an authorized undertaking; that as the pier was the property of the defendants they could exclude the plaintiffs from it although it was a nuisance; that the plaintiffs could not recover rates they had paid under protest because they had received the consideration for that

payment, and that vessels coming alongside and making fast to the pier merely to land and embark passengers were not "mooring" within the meaning of the provisional order; and he dismissed the action and the counter-claim with costs.

The facts are more fully stated in the report of the case before Neville J. (1)

Both the plaintiffs and the defendants appealed.

Peterson, K.C., and *Maugham*, for the plaintiffs. Under ss. 2, 25, 33, and 47 of the Harbours, Docks, and Piers Clauses Act, 1847, and ss. 6, 13, 17, and 19 of the General Pier and Harbour Act, 1862, the public have a right of access to a pier when completed on paying the tolls authorized by the Acts and the provisional order. Here the pier is completed, and we as members of the public have a statutory right of access to it. The pier was constructed under the provisional order. But for that order it could not have been built at all, and the defendants cannot justify possession of it except under the provisional order. Therefore they cannot say that the pier is an unauthorized structure not subject to any statutory liabilities. It is not a question of estoppel, for it is a well established rule that estoppels bind parties and privies, but not strangers: *Smith's Leading Cases*, 11th ed., vol. ii. p. 853; but it would be against the policy of the law to allow the company to set up this answer to our claim: *Putney Overseers v. London and South Western Ry. Co.* (2)

[FARWELL L.J. That decision rested on estoppel or on nothing. There is no such thing as quasi estoppel. Estoppel is not a cause of action, but a rule of evidence. If a man makes a statement he cannot afterwards be heard to say it is not true.]

The test in all cases of estoppel by representation is that the person to whom the representation was made has acted upon it. The leases were taken from a person who is estopped from saying that this is an illegal pier: *Doolan v. Midland Ry. Co.* (3).

(1) [1908] 2 Ch. 460.

(2) [1891] 1 Q. B. 440, 443.

(3) (1877) 2 App. Cas. 792.

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C. A. [FLETCHER MOULTON L.J. This is irrelevant. The pier was
1908 not authorized by or constructed under the provisional order.

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The leases of the land on which it ought to have been built were
surrendered, and the Crown has made a grant of the land with
the pier on it. So we start de novo with the pier in the private
possession of the defendants.]

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We do not admit that. The defendants cannot plead that
the pier was illegally built: *Board v. Board*. (1) The fact
that they subsequently bought the land on which it stands is
immaterial.

Jenkins, K.C., and *E. P. Hewitt*, for Horton, and *Butcher, K.C.*,
and *E. P. Hewitt*, for the Mersey Trading Company, were not
called upon to argue on the plaintiffs' appeal.

COZENS-HARDY M.R. On the main point which has been
argued here I think the decision of Neville J. was perfectly
right. The state of facts is somewhat remarkable. A provisional
order was obtained authorizing the erection of a pier at Colwyn
Bay. The provisional order was unusually precise in its terms.
It defined the exact position in which the authorized pier was to
be erected, and although there were limits of deviation shewn
on the plan, they were not limits of deviation in the sense in
which those words are ordinarily used where the Lands Clauses
Act is incorporated, but were only limits of deviation to this
extent, that within those limits, if the consent of the Board of
Trade was obtained, and not otherwise, the pier might be erected
on a line to that extent departing from the authorized line.
There was no power, even with the consent of the Board of
Trade, to erect a pier outside the limits of deviation.

Under circumstances which have not been explained and
which at present I do not in the least understand, a pier was
commenced and in the year 1900 was completed which entirely
departed from the line of the pier authorized by the provisional
order. A look at the ordnance map which has been put in by
the appellants, and which I take to be substantially correct,
leaves me in doubt whether anything more than just a few
stones at the landward side forms any part of the authorized

(1) (1873) L. R. 9 Q. B. 48.

pier. This much is quite clear, that the pier, which is of great length, is to a very large extent outside the limits of deviation which I have mentioned, and to a still larger extent down to the very commencement, although within the limits of deviation, is not an authorized pier, because the consent of the Board of Trade was never obtained to it. The company, of course, could do nothing with the mere possession of this provisional order, and they then obtained two leases from the Crown, one of the leases from the Crown demising precisely the site within the limits of deviation, and the other being a lease of part of the foreshore as to which apparently no question directly arises here. The company mortgaged the leases, as they were entitled to do, but was soon wound up and disappeared. The undertaking was vested in certain other people, and ultimately the defendant Horton acquired the two Crown leases. Whether he acquired them in the name of a trustee for himself or otherwise is quite unimportant. He completed the end of this unauthorized pier in the year 1900. It was then discovered that, either by accident or design, I know not which, this pier was altogether in the wrong place, and therefore was not authorized in any way by the provisional order. What did he do? He then approached the Crown, and a complete and absolute surrender to the Crown of these two Crown leases was made by deeds in January, 1901, and in the following month he obtained from the Crown grants of different property, namely, not merely the parallelogram shewn on the deposited plan, the two sides of which were within the limits of deviation, but a much larger piece, including the site of the de facto unauthorized pier. What is the result of that? Mr. Horton is in possession of this soil and, according to the express terms of the grant, of the physical structure, the pier, which is upon it. He is not claiming any benefit under the provisional order. He is not asserting any rights under that provisional order. He simply says, "I am in possession of this soil by virtue of the Crown grants. The leases under which this pier was wrongly supposed to have been erected have disappeared and have absolutely gone, they can never be set up again, and I am simply a landowner in possession of a structure which may or may not be a nuisance. That is not a matter in

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issue in this action, and if it is a nuisance, this is not a proceeding to require it to be abated." He says, "I am in possession of a structure which, whether it be a nuisance or not, is one which does not possess and does not claim to possess any of the immunities, rights, and privileges which were conferred by the provisional order." I can see no answer to that. I do not think it at all necessary to consider what would have been the position if the original company had erected the pier outside the limits of deviation and there had been no surrender of the lease; still less do I deem it necessary to consider the second proposition, whether, even if the company were in that position, Mr. Horton would have had the same liabilities prior to the surrender of the lease. I have no doubt that any person who really claims and asserts rights under the provisional order could not at the same time say "The pier in respect of which I claim these rights is outside the authorized limits." But nothing of that kind seems to me to arise here. I regard this as an unauthorized pier, and not as a pier the possession of which entitled the possessor to any of the rights, privileges, or immunities conferred by the provisional order. That being so, the case of the plaintiffs, which entirely depends upon this being a public pier which possesses those rights, wholly fails, and this appeal so far as this part of the case is concerned must be dismissed, and be dismissed with costs.

FLETCHER MOULTON L.J. I am of the same opinion. I do not propose to say anything as to whether or not this pier is or might be a nuisance, or as to whether the public may have any right to have the pier removed; I intend to confine myself strictly to what, in my opinion, are the facts in the case which are relevant to the decision which we have to pronounce.

The plaintiffs claim a right to use this pier as a public pier on certain terms. The defendant Horton denies that right and says, "I am the owner of that pier by virtue of the fact that the Crown sold to me the land on which it is situated with the pier upon it, and as the freeholder of that land I have a right to prevent your coming on to my pier and using it." Those facts

are not denied. The conveyance from the Crown is dated February 21, 1901, and the parcels are perfectly clear and include the site of the pier. There is no attempt to contest the fact that the land thereby conveyed was at that time in possession of the Crown as owner. We therefore find a perfect title in Mr. Horton to the fee simple of the land with the pier upon it, and under those circumstances I cannot see how there can be any right whatever in the plaintiffs to use this pier excepting on such terms as the owner of the pier imposes. For this reason I think the appeal must be dismissed.

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FARWELL L.J. I am of the same opinion. The case appears to me to be really a simple one when it is understood. There is a conveyance from the Crown in 1901 of certain land with a pier upon it. The defendants justify under it. The plaintiffs reply that there was an antecedent statutory power to make another pier in a different place, and that this pier must be deemed to have been made under that statutory power, and that the defendants cannot be heard to say otherwise. Notwithstanding what has been urged before us, I do not understand any ground on which the defendants can be debarred from setting up the truth unless it is by estoppel. Even assuming that the original company would have been estopped, as to which I express no opinion, I cannot see how Mr. Horton, claiming as he does under an independent title by grants from the Crown, can be said to be either party or privy to any estoppel so as to bring himself within any recognized doctrine of the law. Mr. Peterson invited us to put it on the ground of public policy, but public policy has been said to be like an unruly steed, and recourse is to be had to it only under exceptional circumstances, and there are none such in the present case. If Mr. Horton has been guilty of a public nuisance, then there is a remedy which the Attorney-General will be able to enforce against him, and he will not be able to rely on any Board of Trade order, or provisional order, or statute as things stand at present. That is the only attack to which, as it appears to me, he is open, and I cannot see how he can be prevented from stating the truth, which is that the pier is on his own land, that he is not using

C. A. any statutory power, and that he is not bound to admit anybody
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[The questions raised by the cross-appeals were compromised.]

Solicitors: *Rawle, Johnstone & Co., for Hill, Dickinson & Co.,
Liverpool; Warwick Webb & Co.*

H. C. R.

C. A. GREAT WESTERN RAILWAY COMPANY v. CARPALLA
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EVE J.

[1907 G. 2110.]

June 23, 24,
25, 27, 29, 30;
July 1, 2, 3,
14.

*Mines and "other Minerals"—China Clay—Railway Company—Compulsory
Purchase of Surface—Right to Support—Railways Clauses Consolidation
Act, 1845 (8 & 9 Vict. c. 20), ss. 77, 78.*

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Nov. 18, 19,
20, 23.

China clay underlying land in Cornwall purchased by a railway company for the purposes of its undertaking, and occupying only a small fraction of the subsoil, is a "mineral" within the meaning of s. 77 of the Railways Clauses Consolidation Act, 1845.

Lord Provost and Magistrates of Glasgow v. Farie, (1888) 13 App. Cas. 657, distinguished.

THIS was an appeal from a decision of Eve J. which raised the question whether china clay under a piece of land in Cornwall purchased by a railway company for the purposes of its undertaking was a "mineral" excepted from the conveyance by virtue of s. 77 of the Railways Clauses Consolidation Act, 1845. The facts were shortly as follows.

In the year 1896 the Great Western Railway Company became the owners of the undertaking, property, railway, and works of the Cornwall Minerals Railway Company. This railway was constructed in part across some two and a half acres of land in the parishes of St. Mewan and St. Stephen's in Branwell, in the county of Cornwall, acquired for the purposes of the railway under their statutory powers from a predecessor in title of the defendant Viscount Clifden, and conveyed to the Cornwall Minerals Railway Company by an indenture dated November 17,

1881. The purchase-money paid for these two and a half acres was a sum of 336*l.* 16*s.* 6*d.*, and the conveyance contained no reference to mines or minerals.

The Carpalla United China Clay Company, Limited, and their predecessors for many years past had been digging and excavating from land belonging to their co-defendant Viscount Clifden, immediately adjoining and lying to the west of the land sold to the railway company, large quantities of a rock or substance known as china clay rock. The rock had been removed by surface or open workings, the excavation resulting in a large quarry or pit of considerable area and depth. The workings had been carried on under setts or licences granted by Lord Clifden and his predecessors, and in April of 1907 were approaching at one part very close to the boundary of the railway company's land.

On April 17, 1907, Lord Clifden and the Carpalla Company served upon the railway company statutory notices under s. 78 of the Railways Clauses Consolidation Act, 1845, of their respective intentions to dig, work, mine, and search for the china clay, china stone, and mica clay lying under the railway and works connected therewith, and in, under, and throughout lands adjoining to and within the distance of forty yards from the said railway and works. By a sett or lease executed in June, 1907, and subsequent therefore to his statutory notice to the railway company, Lord Clifden granted to the Carpalla Company licence to work, mine, and search for china clay, china stone, and mica clay under and throughout the land comprised in his notice, for a term of twenty-one years from January 1, 1907. Upon receipt of the notices the railway company did not, within the statutory period or at any time thereafter, express their willingness under s. 79 of the said Act to treat with the Carpalla Company or Lord Clifden for the payment of compensation, and in October, 1907, commenced this action against the Carpalla Company and Lord Clifden, claiming an injunction to restrain the defendants from excavating upon the lands near or adjacent to the railway so or in such manner as to let down or otherwise injure the said railway or the land upon which the same is situate, or to deprive the plaintiffs of their right to have the same

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railway and land laterally supported by the said adjacent lands, and from entering into and upon the plaintiffs' railway and land and excavating thereon or removing the china clay and other the soil or subsoil thereof.

The action was tried with witnesses and occupied nine days in the Court below, a great deal of scientific evidence being put in as to the nature, composition, and origin of china clay, the result of which is given in the following judgment of Eve J. The action came on for hearing on June 23, 1908.

Cripps, K.C., P. O. Lawrence, K.C., Howard Wright, and Colefax, for the plaintiffs.

Astbury, K.C., and A. F. C. Luxmoore, for the Carpalla Company.

Sir R. Finlay, K.C., Upjohn, K.C., and Christopher James, for Viscount Clifden. (1)

July 14. EVE J., after stating the facts as above, referring to ss. 77, 78, and 79 of the Railways Clauses Consolidation Act, 1845, and stating the nature of the action, continued:—The claim to this relief is founded on the assertion that the substance sought to be excavated and removed is in fact part of and not a mineral under the land purchased by the company, and this is the issue which I have to determine. The notices of intention to work specify three substances, china clay, china stone, and mica clay, but it is admitted that there is no china stone to be worked here, and mica clay is only a clay of a coarser and rougher texture deposited in the process of producing china clay, and at these particular pits it is discarded as refuse. For all practical purposes, therefore, the intention to excavate and work may be regarded as an intention to excavate and work for the purposes of obtaining china clay, and it is to this substance, its nature, composition, texture, and characteristics, to the materials from which its component elements are derived, and to the agencies which have brought about the conditions in or under

(1) The arguments were the same and it has not been thought necessary to report them twice over. in the Court below, though not quite so full, as in the Court of Appeal,

which these materials are found, that the evidence has been mainly directed. The substance known as china clay or kaolin is a clay possessing exceptional qualities, primarily of colour and to a lesser degree of purity and softness, which render it suitable for use principally in the manufacture of porcelain, and to some extent in the manufacture of high-class paper and in the bleaching of calico. That it has many characteristics common to other clays is demonstrated by the geological examinations and chemical analyses made by the eminent scientists who have given evidence at this trial. It is produced by submitting to a process of hydration a rock or substance known as china clay rock. This rock, which occurs in nests or pockets in the granite formation only, is found in a state of more or less decomposition, and generally charged with moisture to a greater or less extent. The nest or pocket is, as a rule, situate on the slope of a hill, and its presence is indicated by a slight depression on the surface corresponding to the superficial area of the nest or pocket. According to the evidence of Mr. Coon, who speaks with an experience of thirty years as an engineer and as a merchant and manager in connection with the china clay industry, the china clay rock never comes to the surface; it is always found under what is called an overburden. As a rule this overburden consists of granite lying immediately below the surface soil or meat earth, as it is termed in the West of England, in a condition of more or less disintegration, rottenness, or decomposition. I say "as a rule" because in this case an instance has been proved at Central Treviscoe where china clay rock has been found under an overburden of hard solid granite thirty feet and more in thickness, and in the very pit now being worked by the defendant company it has been proved on both sides (east and west) of the railway to underlie an overburden of killas varying in thickness from ten feet to forty-six feet. To get at the china clay rock the meat earth and the overburden are wholly removed, the result, of course, being a complete destruction of the surface. The china clay rock is then excavated, broken up with picks, and exposed to the action of running water on a slope. The coarser and heavier elements of its composition are precipitated early in the process, and then, by a

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series of operations involving chiefly successive checks of the flow of water and consequent successive deposits of the heavier particles present in solution, the lightest and finest elements are ultimately alone left in suspense in the water, and these, when finally precipitated and dried, constitute the commercial article known as china clay. This is the substance which the defendants contend is a mineral within the statute, and which the plaintiffs allege to be the soil or subsoil which they have already purchased and on which their railway has been built. In order to determine which of these contentions is right it is necessary to inquire into the composition and origin of the china clay. As I have already said, the china clay rock occurs in the granite formation only. Granite is an igneous rock the mineral constitution of which differs in various places, but which may be said to be practically of general uniform crystalline constitution composed of felspar, quartz, and mica. Granite when exposed to atmospheric or other agencies becomes decomposed to an extent varying with its mineral constitution, and the first element which is the subject of decomposition is the felspar. The decomposed felspar results in the formation of a clayey material, and china clay rock is granite in which the felspar has been wholly decomposed and replaced by this clay. Different opinions are held by geologists and others as to the agency by which this complete decomposition has been brought about. Some contend that the decomposing agent is the carbonic acid in the rain-water. Others again reject the rain-water or sub-aerial theory and insist that all the known facts combine to prove that the agency by which such complete decomposition has been brought about had its origin in subterranean depths, and that the agent penetrated to the decomposed mass by means of cracks and fissures, many of which are now filled up with minerals which admittedly came from lower depths. A third class of scientists, represented by some of the most eminent who have given evidence in this case, incline to the view that both causes—sub-aerial and subterranean, or pneumatolytic, as the latter has been called—may have contributed to the result. Between these conflicting opinions it is fortunately not necessary for me to decide. It is sufficient for my purpose to find as a fact that

there are in the granite formation in the part of the country with which I have to deal in this case nests or pockets of varying superficial areas, and in most instances of unknown depths, wherein is to be found a granite in which the felspars have been wholly decomposed and replaced with the clayey material I have already mentioned. It is further established by the evidence that these nests or pockets are sporadic, that their existence adds materially to the value of the land, and that their presence or absence is not to be accounted for by any apparent differences in the overlying granite or other materials. As a general rule it may, I think, be said that they occur under an overburden of less decomposed granite, but, as I have already stated, they have been found under hard undecomposed granite, and under a wholly alien overburden such as the killas. Even when it occurs under an overburden of decomposing granite, china clay rock has, I think, characteristics apart from colour which differentiate it sufficiently from the overburden to enable those acquainted with the local formation to fix approximately the line of demarcation between the overburden and the china clay rock. The decomposed felspar—the clayey substance which has replaced the felspar—constitutes, say the defendants, the china clay. All we do, they add, is to extract this clayey substance by a sifting or washing process, whereby we disengage it from the other material with which it is found in mechanical combination. I cannot myself see that it is any answer to this contention to say that in the china clay of commerce there is still to be found a proportion of the other materials with which the clayey substance was originally completely combined. Take for example the presence of mica crystals in the commercial china clay. It is admittedly one of the objects of the washing process to separate the clayey substance from the mica, and this to a large extent is achieved, but because it is not wholly effected, and because the china clay is merchantable, notwithstanding the continued presence of some mica crystals, can it logically be asserted that mica is an essential constituent of china clay? I cannot bring myself to adopt any such view. In my opinion china clay or kaolin is the clayey substance in the china clay rock representing the decomposed felspar, and the mere fact that in the process of separating

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and extracting it from the rock a condition of disengagement is reached which is sufficient for practical commercial purposes, and beyond which it is therefore unnecessary to prolong the process, cannot, in my opinion, alter the real nature of the substance or convert the resultant product from a natural substance into an artificial combination of diverse elements originally combined in wholly different proportions. On the evidence, therefore, I come to the conclusion that china clay is a natural product—that is, the substance representing felspar in granite which has been converted into china clay rock by the complete decomposition of one of its three essential constituents. The question I have now to decide is whether such a clay as I have described is a mineral. It is common ground that it has been so regarded by geologists, mineralogists, and text-book writers for very many years past, not only in this country, but in America, France, and Germany. Jameson as early as in 1820, Professor Lapworth himself as late as in 1899, and Dr. Hatch and Professors Dana and Miers—the latter the well-known professor at Oxford—at intermediate dates, are all responsible for well-known and authoritative works wherein it is classed as a mineral. It is true that when the witnesses for the railway company were confronted with these authorities they drew a distinction between kaolin and the china clay of commerce and suggested that the former might possess attributes which would qualify it as a mineral, but which were not to be found in the latter, but I attach no importance to this distinction, in that I regard kaolin and china clay as convertible terms, and the mere fact that the clay can be turned to commercial uses without being altogether dissociated from foreign substances cannot, in my opinion, alter its real character. But the question does not really rest on the printed authorities to which I have just alluded. The scientific witnesses who were called on behalf of the railway company frankly admitted that down to some time in the latter part of last year they shared in the generally accepted view that kaolin or china clay was a mineral. Indeed in a case tried in 1904, *North British Ry. Co. v. Turners, Ltd.* (1), Professors Boyd Dawkins and Lapworth, two of the witnesses who in this case have been called to prove

that it is not a mineral, gave evidence that kaolin or china clay — treating the two words as synonymous—is a mineral, a definite chemical composition, and having very frequently a definite crystalline form. These views they have been led to discard, so they told us in the box, by more careful microscopic and local examinations of china clay and the sources from which it is derived, and the conclusions to which these examinations have led them are directly opposed to those which they shared with the scientific world generally down to the summer of last year. They now degrade china clay to an artificial product, a heterogeneous compound or mixture of everything that is in the china clay rock, and unredeemed by any one of the qualities which Dr. Hatch says are the essential characteristics of a mineral—that is to say, definite mineral composition, definite physical qualities, and definite crystal form. On the other hand, Professor Gregory, with whose evidence I was much impressed, would be no party to what I have called the degradation of kaolin or china clay. In his opinion it is a mineral, the main bulk of which is kaolinite, a crystalline substance which all parties agree is in all senses of the word a mineral. It is right that I should add that none of the plaintiffs' witnesses would admit the presence of kaolinite in the Carpalla kaolin, and on the evidence as it stands I should not be prepared to hold that this has been conclusively established. But again I am not really called upon to decide between the conflicting views of scientific men as to the exact category in which this china clay should be included to secure that accuracy of expression at which science is always aiming. What I have to determine is whether the substance is a mineral within the meaning of the Act of Parliament. Having heard all the evidence and listened to the forcible arguments which have been addressed to me, I cannot entertain any doubt as to its being such a mineral. It is found in intimate combination with elements which go to make up the subsoil of the district, and it owes its origin to the decomposition in past ages of constituent parts of that subsoil, but in its present condition occurring sparsely and sporadically, and always under an overburden of a character distinctive from the rock in which it is found, it cannot, I think, with any justice be regarded as constituting the

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land sold. It is a sedentary deposit occupying the space formerly occupied by the felspars. It can only be abstracted by the disintegration of that wherein it is deposited, and when so abstracted it is a thing which, to use Buckley J.'s words in *Great Western Ry. Co. v. Blades* (1), "has a value of its own apart from the soil in which it is found." It is not, in my opinion, the soil itself. Whatever be the true scientific definition of a mineral, and whatever be the correct classification of kaolin thereunder, I cannot bring myself to hold that a substance universally regarded as a mineral before and for more than sixty years after the passing of the Act which I am construing ought now to be treated as not falling within the class of substances therein referred to as minerals. Under all the circumstances, therefore, I do not consider the facts of this case bring it within either of the authorities which have been so fully discussed, and holding as I do that the china clay is a mineral within the meaning of the Act of 1845, I have no alternative but to dismiss the action with costs.

C. A. The plaintiffs appealed. The appeal came on for hearing on November 18, 1908.

Sir C. A. Cripps, K.C., P. O. Lawrence, K.C., Howard Wright, and Colefax, for the appellants. The defendants are not entitled to work these beds of clay so as to let down our railway line. The question turns on the meaning of the word "minerals" in ss. 77 and 78 of the Railways Clauses Consolidation Act, 1845. Though a "mineral" *prima facie* includes anything lying under the land which has a value of its own, as being capable of being used independently of the land, yet that rule may be modified by the circumstances of the case where the mineral in question is excepted from the purchase of the land by virtue of a statutory reservation. In determining whether we have bought the right to support by the clay in question in this case the Court will take into consideration all the surrounding circumstances. Clay is not invariably a mineral. Where it forms the surface or subsoil it will be held to constitute the "land" purchased for the purposes of the

(1) [1901] 2 Ch. 624, 638.

undertaking, and not a mineral within s. 77: *Lord Provost and Magistrates of Glasgow v. Farie* (1); *Great Western Ry. Co. v. Blades*. (2) Although the conveyance to our predecessors does not expressly provide for it, it must be taken that they bought this clay, which is really only part of the surface soil, and that we are entitled to restrain the respondents from working it: *In re Todd, Birlestone & Co. and North Eastern Ry. Co.* (3)

[FLETCHER MOULTON L.J. referred to *Ruabon Brick and Terra Cotta Co. v. Great Western Ry. Co.* (4)]

Lord Provost and Magistrates of Glasgow v. Farie (1) was not overruled or shaken by *Midland Ry. Co. v. Robinson*. (5) No doubt in some cases clay is a mineral within the section, whether it is got by underground or by open workings: *Midland Ry. Co. v. Haunchwood Brick and Tile Co.* (6); but we do not suggest any distinction founded on the method of working the clay.

Sir R. Finlay, K.C., Upjohn, K.C., and Christopher James, for the defendant Viscount Clifden. In determining what is a mineral within the statutory exception regard must be had to the object of ss. 77—79, which was merely to enable a railway company, instead of purchasing the minerals at the time when they purchased the land, to postpone payment for the mines or minerals under or near the railway until the mine owner gave notice of his intention to work them. As regards the authorities there is no analogy between the facts of this case and the facts in *Lord Provost and Magistrates of Glasgow v. Farie*. (1) That case decides nothing except that where the alleged mineral forms part of the ordinary soil of the district it is not to be considered a mineral within the exception in s. 77; it proceeded on the footing that the clay which was in question in that case formed the very substance of the ground which had been purchased. *Great Western Ry. Co. v. Blades* (2) and *In re Todd, Birlestone & Co. and North Eastern Ry. Co.* (3) are to the same effect. In *Midland Ry. Co. v. Robinson* (5) the only point decided was that minerals excepted from the conveyance by the Act could be worked by open workings, and it has no bearing on this case.

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(1) 13 App. Cas. 657.

(2) [1901] 2 Ch. 624.

(3) [1903] 1 K. B. 603.

(4) [1893] 1 Ch. 427.

(5) (1889) 15 App. Cas. 19.

(6) (1882) 20 Ch. D. 552.

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Here the china clay does not form part of the ordinary subsoil of the country; and in fact it is so rare that it forms less than 1 per cent. of the subsoil. The decomposition of the felspar which takes place below the surface is distinct from disintegration, and the felspar is converted into china clay, which is a specifically different thing. China clay is unquestionably a mineral, and it lies at some considerable depth from the surface. What the defendants are taking away is not the subsoil generally, it is only a small fraction which is extracted from the subsoil.

Astbury, K.C., and *A. F. C. Luxmoore*, for the Carpalla Company, adopted the argument of their co-defendant.

P. O. Lawrence, K.C., in reply. The evidence shews that what the defendants are carrying away is the soil of the district, just as much as the clay was in *Lord Provost and Magistrates of Glasgow v. Farie* (1) and *Great Western Ry. Co. v. Blades*. (2) The real question is what is the subsoil in this particular district; it is what the defendants are carrying away, which in fact is the "land" purchased for the purposes of the undertaking.

COZENS-HARDY M.R. The question in this appeal is whether the Great Western Railway Company, or their predecessors in title, purchased china clay, or whether the Great Western Company must now purchase it. The conveyance under which the Great Western Railway Company claims was executed in 1881. It conveyed the strip of land upon which the line is now completed, but it did not include those things which were excepted by virtue of s. 77 of the Railways Clauses Consolidation Act, 1845. That section I had better read: "The company shall not be entitled to any mines of coal, ironstone, slate, or other minerals under any land purchased by them, except only such parts thereof as shall be necessary to be dug or carried away or used in the construction of the works, unless the same shall have been expressly purchased." There is no suggestion that whatever was excepted was expressly purchased here, and the section goes on, "and all such mines, excepting as aforesaid, shall be deemed to be excepted out of the conveyance of such lands, unless they shall have been expressly named therein and conveyed thereby."

(1) 13 App. Cas. 657.

(2) [1901] 2 Ch. 624.

Now this section has given rise to a great number of decisions, which represent various views of the meaning of the words there used. If it were necessary for me to attempt to reconcile the views of the learned Law Lords who decided *Lord Provost and Magistrates of Glasgow v. Farie* (1), or to discover any common principle running through their speeches, I should certainly desire time to consider my judgment, but no such task is, I think, imposed upon me. I take that case as finally deciding that where a bed of clay underlies the surface, and is the ordinary soil of the whole district in which the land is situate, such clay, though it might elsewhere be a mineral, is not within the statutory reservation to the vendor, but passes to the railway company as part of the land which was conveyed to the railway company. It was not disputed that before the decision in *Lord Provost and Magistrates of Glasgow v. Farie* (1), and apart from that case, the present appeal could not have been presented with any prospect of success. In my opinion the facts of the present case fall short of, and in truth bear but slight resemblance to, the facts in *Lord Provost and Magistrates of Glasgow v. Farie*. (1) China clay is not the substance of the subsoil; beneath the "meat earth" there is found a stratum or layer of irregular but very considerable depth, which is locally known as the "overburden," or (in part of the pit or mine which we have heard most of) as "growan." This "overburden" is not china clay and does not possess the properties of china clay; it has to be removed until a stratum or layer of china clay rock is reached. The upper layer may be regarded as disintegrated granite; the lower layer is decomposed granite, from which kaolin or china clay is obtained by washing, a process very similar to that used in streaming for tin. The attempt to make out that the upper layer differs only in colour from the lower layer seems to me to have wholly failed. It is not sufficient to say that both are granite formations. I attach considerable importance to the fact that within a few yards, and on one side of the Carpalla mine or quarry, the china clay bed is found beneath an upper stratum of killas, and it could scarcely be argued that that china clay was china clay which the Carpalla Company were

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C. A. not entitled to work. On this short ground, which is substantially that upon which Eve J. proceeded, I agree with his judgment, and I think this appeal must be dismissed with costs.

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FLETCHER MOULTON L.J. I am of the same opinion. The scheme of the Railways Clauses Consolidation Acts with regard to mines situated beneath land proposed to be taken for the railway is to give to the railway company the privilege of postponing purchase of those mines until such time as the owner of the land which they are purchasing may desire to work them or mines contiguous to them. It was not intended that this provision should in any way do injustice to either party. I may respectfully say I agree with the remarks of Lord Macnaghten in *Lord Provost and Magistrates of Glasgow v. Farie* (1) that the scheme was one which was advantageous to both. Bearing in mind that it is merely a question of postponement of purchase the question which the Court has here to decide presents itself in this shape: Aye or No, by the conveyance of the land, without mentioning "all the mines or minerals," was the china clay then and there purchased by the railway company?

In the first place let me say that I cannot entertain any doubt as to china clay being a mineral. It seems to me to be typically a mineral in the ordinary and in the legal acceptance of the term. I reject the whole of the evidence that was given at the trial of this case with regard to china clay being a mineral on two grounds. In the first place I think that such evidence was inadmissible. The question is as to the interpretation of an ordinary English word in its proper legal acceptance, and that is for the Court, and is not a matter of evidence. The other ground upon which I reject it is that in my opinion the whole of that evidence was directed to a false issue. It consisted in asking mineralogists whether this substance, so well known commercially and so important industrially, was a mineral. To a mineralogist the question would mean, Was it a definite and specific mineral, homogeneous, and possessing

(1) 13 App. Cas. 657.

known mineralogical characteristics? That is an issue which is perfectly immaterial here. Many of the best-known minerals are mixtures of a large variety of different minerals if that word be used in its strict mineralogical sense, but that does not prevent the well-known mixture being in the eye of the law a mineral. Putting that evidence, therefore, on one side, I say that china clay appears to me, in the ordinary acceptation of the word and in the legal acceptation of the word, to be typically a mineral. If I were rash enough to venture a definition of "mineral" I should say that it is any substance that can be got from within the surface of the earth which possesses a value in use, apart from its mere possession of the bulk and weight which make it occupy so much of the earth's crust. I should not think that what in engineering cases is usually known as "contractor's muck" is a mineral. To dig out ballast and crushed stone and earth, a mere mixture of heterogeneous portions of the earth's crust, for the purpose of making embankments, where the material goes from one position in the earth's crust to another without modification or being submitted to any process of manufacture, does not seem to me to be making use of minerals, although no doubt the things that you are handling were originally within the earth's crust. Such materials have not a value in use apart from their bulk and weight, and they are only used as being capable of forming a portion of the earth's crust in a new position. On the other hand, everything that has an individual value in use appears to me to be fairly called a mineral. Limestone may vary from a poor quality that is only worth burning into lime up to the very finest Carrara marble, but all those gradations have a value in use, either for building, or statuary, or for the manufacture of lime. Ironstone for the purpose of obtaining the iron, slate for its numerous uses, to which I need not refer—all these things seem to me to be properly called minerals, because from their properties they have a value in use.

Now apart from authority I should have thought that the group of sections in the Railways Clauses Consolidation Acts which reserves from an ordinary purchase by a railway company mines of coal, ironstone, slate, and other minerals would have

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left the owner of the land from whom it was purchased free to work minerals in that sense, and I cannot myself think that it makes any difference for this purpose whether a particular mineral goes down as far towards the centre of the earth as it is possible to prove it, or whether it comes up to the surface of the earth. I cannot, apart from authority, think that such matter can make any difference to the question of whether it is a mineral either in the ordinary or legal acceptance of the term, or in the sense in which the word is used in those sections of the Railways Clauses Consolidation Acts.

There are, however, authorities which make it doubtful whether this view is correct so far as the use of the word in the Railways Clauses Consolidation Acts is concerned, but they do not raise any doubt in my mind that china clay is a mineral in the ordinary or legal acceptance of the term. A great deal of evidence has been given as to the nature and probable origin of china clay. It is common ground that it is formed in situ and that the primal matter from which it is formed is the granite which is found so widely in that part of the country, and that this granite has passed through a chemical change which has decomposed one of the components (the felspar) which constitute it. The granite has thus been rotted, the felspar not only being decomposed, but also, I conclude from the evidence, partially changed by the intrusion of these chemical reagents into compounds which were not found in the felspar itself. We have not got to decide the question as to whether the chemical reagents came from above or came from below, but I cannot help saying that the theory that this change has been brought about by atmospheric conditions and by the water that comes from above appears to me wholly insufficient to account for the presence of the china clay, and if I had to decide the question I should say that the operations by which the china clay has been produced were very much more closely akin to those operations whereby the rock of a country is metallized and veins are formed. This altered granite is found in granitic formations sporadically and exceptionally. It is quite true that in the southern portion of Cornwall it is found much less rarely than in other granitic portions of the world. That is not very surprising, since this part of Cornwall has evidently been in the past subjected

to influences which have metallized much of the rock, and probably some of those influences have caused the comparatively frequent occurrence of china clay in this neighbourhood. But although its occurrence in South Cornwall is comparatively frequent as compared to its presence in granitic districts generally, even here in neighbourhoods which include the richest portion of the deposits of china clay it is very rare. We have evidence that it amounts to only a little more than a half per cent. on the large granitic estates of Lord Clifden. You have only to look at the map to see that, so far from its being the ordinary rock of the neighbourhood, it is so rare, and it appears in such small quantities, that to find it in a locality is somewhat like striking oil in Pennsylvania—it is considered to be a very valuable discovery.

Nor is it only that the occurrence of the china clay rock is exceptional. We have also to consider what is done with this rock to extract from it commercial china clay. The rock is granite; only one of the three component parts of granite is true china clay; and although no doubt in commercial china clay a certain portion of the mica is also to be found, yet still that which makes it china clay is the presence of a large proportion of decomposed felspar. But it is clear from the evidence, and from the nature of the bodies, that a very large portion of the old granite (more especially that which existed in the shape of quartz) must be separated from this china clay rock by manufacturing operations in order to make commercial china clay, and in fact the china clay is extracted much in the same way that galena or other lead ores would be extracted from the results of mining a lead lode.

Keeping these facts in one's mind, one asks oneself, Is there any case which has ever decided that a rare and valuable substance, obtained exceptionally from under the surface of the earth by means of mining and manufacturing operations such as these, is not a mineral within the meaning of these reservations? I can find no such case. The only case which is put to us as an authority to the contrary binding upon us is *Lord Provost and Magistrates of Glasgow v. Farie*. (1) *Great Western Ry. Co. v.*

(1) 13 App. Cas. 657.

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Blades (1) was confessedly a case which followed *Lord Provost and Magistrates of Glasgow v. Farie* (2) and does not carry the matter any further. Now, on looking at *Lord Provost and Magistrates of Glasgow v. Farie* (2), I find that the opinions of the four learned Lords who decided that case went on very different grounds. The dissenting judgment of Lord Herschell held that the reservation was extremely wide. The judgment of Lord Macnaghten agreed with that of Lord Herschell so far as concerns limitations to the reservation, depending on the nature of the mineral, but he considered that "mines" as used in these sections of the Railways Clauses Consolidation Acts did not include open workings. The opinions of Lord Halsbury and Lord Watson, however, did turn upon the nature of the substance which it was proposed to take out of the ground, and, reading their opinions with a very genuine desire to arrive at that which influenced their Lordships, I have come to the conclusion that they decided that the brick earth in that case was not within the reservation because that which was proposed to be removed from the soil would have been generally regarded in the locality as mere soil. It was the clay which was the common soil of the neighbourhood, and I think that both of those learned Lords came to the conclusion that, in the fair interpretation of a conveyance of the land reserving the minerals in such a locality, this common soil of the neighbourhood would have been supposed to pass as land and not be reserved as minerals. I do not think that they intended to lay down that things which were in their nature minerals ceased to be within the reservation if they came up to the surface of the ground. It is evident that Lord Watson did not, because in a subsequent case, in which he said that he adhered to all that he had said in *Lord Provost and Magistrates of Glasgow v. Farie* (2), he held that if the surface of the ground consisted of substances which were properly termed minerals the very surface itself might be taken. Now on that interpretation of the judgments of those noble Lords it is clear that the decision in *Lord Provost and Magistrates of Glasgow v. Farie* (2) does not affect the present case. I do not think that any two things could be more strikingly opposed in their nature than this rare and

(1) [1901] 2 Ch. 624.

(2) 13 App. Cas. 657.

exceptional mineral (known it is true as china clay, but as little like clay in appearance as almost any mineral could be) and the common clay which would be considered to be the ordinary soil of an agricultural district. I feel, therefore, no difficulty in this case arising out of the decision of the House of Lords in *Lord Provost and Magistrates of Glasgow v. Farie*. (1) I hold that these deposits are minerals, that they were not purchased by the Great Western Railway Company at the date when they purchased the land, but remained the property of the person who sold the land to them; and I cannot say that I feel that such a decision is either extraordinary in its consequences or unfair to the Great Western Railway Company, even though it could be shewn that these minerals extended from the surface to the centre of the earth, because it only means that these minerals have to be purchased now because they were not purchased then. It is only a question of the date and not of the amount of the payment to be made for the land, because, as they certainly belonged to the owner of the land at the time the railway company made the purchase, the railway company would be obliged then to purchase, or must now pay for these minerals, however valuable they are and however deep they descend.

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FARWELL L.J. Whatever may be the difficulties occasioned by the reasons given in some of the decided cases, I cannot say that I think there is any difficulty in deciding the present case when the facts are once known. It appears to me to turn on the true construction to be put on the conveyance of 1881, read by the light of the Railways Clauses Consolidation Acts and bearing in mind the relation of the parties, namely, a railway company, with compulsory powers for the purpose of making its line, and a vendor. These considerations exclude the ordinary presumptions as to the surface owner acquiring the right to support. The true view is that pointed out in many of the cases, that the railway company buys under exceptional circumstances, having a postponed option of purchase of minerals—a postponement which, as explained by Lord Macnaghten in *Farie's Case* (2), is for the

(1) 13 App. Cas. 657.

(2) 13 App. Cas. 696.

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benefit both of the railway company and of the owner of the minerals. Regarded from that point of view, and putting oneself in the position of the parties as they were in 1881, then, with the qualification I have already stated arising from the fact that the parties are a railway company acquiring under statutory powers and a vendor, I see no reason why the other ordinary rules applicable to construction of documents should not apply. One such rule is that stated by Lord Ellenborough in *Robinson v. French*. (1) A written instrument must be "construed according to its sense and meaning, as collected in the first place from the terms used in it, which terms are themselves to be understood in their plain, ordinary, and popular sense, unless they have generally in respect to the subject-matter, as by the known usage of trade, or the like, acquired a peculiar sense distinct from the popular sense of the same words; or unless the context evidently points out that they must in the particular instance, and in order to effectuate the immediate intention of the parties to that contract, be understood in some other special and peculiar sense." I ask myself, In 1881 what was the term which would be applied to china clay within that definition? Clearly, a mineral. I have only to go to Professor Lapworth to discover that. He tells us, and the text-books also shew, that china clay, the only clay acknowledged by geologists as a mineral, is kaolin or china clay, which, like other minerals, sometimes appears crystallized, and then has a definite composition and a particular character, and so on. That was evidence which he gave in *Great Western Ry. Co. v. Blades*. (2) He goes on to say that he has since changed his mind, but that is absolutely immaterial. The inquiry is, What was the ordinary accepted sense in 1881? The Professor says he accepted this from the ordinary text-books and the ordinary state of knowledge at the time he gave his evidence in *Great Western Ry. Co. v. Blades* (2), which was obviously in accord with what was the ordinary knowledge in 1881. The meaning of the word "excepted," by virtue of the Act, from the conveyance cannot be altered because experts have since changed their minds as to the true scientific terminology. The parties were then dealing with a

(1) (1803) 4 East, 130, 135.

(2) [1901] 2 Ch. 624.

substance well known, certainly in the West Country, and excepted from the conveyance, because it was well known to be, and was spoken of by the parties to the conveyance and everybody else as, a mineral; and I agree with Fletcher Moulton L.J.'s observations as to the inapplicability, both by reason of inadmissibility and irrelevancy, of the greater part of the expert evidence here given. It was irrelevant for the further reason, to my mind, that it was addressed to the wrong period; it does not matter that the professors have changed their minds as to the true definition of kaolin or china clay since the year 1881. The point is, What did ordinary persons, amongst whom must be included the contracting parties to this conveyance, mean by the words "china clay" in 1881? Was it or was it not a mineral? I cannot doubt myself that if the parties then bargaining for the conveyance of the land had said "But there may be china clay here," the answer would have been, "If there is it is a mineral, and we need not trouble ourselves about it, because you will be able to work it if and when it is found." That disposes of the case, and shews why, in my opinion, *Lord Provost and Magistrates of Glasgow v. Farie* (1) has no reference to it. If the defendants had been quarrying granite to be used for metalling roads, or something of that sort, there might have been a question whether or not it came within *Lord Provost and Magistrates of Glasgow v. Farie* (1); but when they are in fact taking this mineral substance, which I understand to be felspar in some way or other turned into a hydrated silicate of alumina by some chemical action the exact nature of which is not known, it appears to me that so far from its being the soil it is a very, very small fraction of the soil, and without desiring to criticize Lord Halsbury, I venture to think that he was a little hard on Mellish L.J. I do not think the Lord Justice intended to say that the definition of "mineral" can depend on the fluctuation of the market. What I understand him to mean is that china clay might be regarded as a mineral because it is one of those things which are usually worked with the object of making a profit, not because a profit is made, but because the object is to make a profit, and the substance is extracted from the soil for

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the purpose of making a profit out of it when gotten. It is not taking the soil itself, but extracting a mineral substance from the soil. The result is, in my opinion, that Eve J. was quite right.

Solicitors: *R. R. Nelson; Coode, Kingdon & Cotton, for Shilson, Coode & Co., St. Austell; Walker, Martineau & Co.*

W. C. D.

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CHAPMAN v. MICHAELSON.

[1908 C. 508.]

Money-lender—Registration—Mortgage in favour of unregistered Money-lender—Validity—Declaratory Order—Equitable Relief—Imposition of Terms—Money-lenders Act, 1900 (63 & 64 Vict. c. 51), s. 2, sub-s. 1 (a), (b), (c)—Rules of Supreme Court, 1883, Order XXV. r. 5.

The trustee of a debtor under a scheme of arrangement with his creditors brought an action against an unregistered money-lender, who, in the course of his business, had taken a mortgage from the debtor to secure a loan, for a declaration that the mortgage was illegal and void under s. 2 of the Money-lenders Act, 1900:—

Held, that the Court had power to give a declaratory judgment, although no ancillary relief was claimed, and that it ought not to impose upon the plaintiff equitable terms as to repayment of the actual money advanced as a condition of giving the declaratory judgment.

Lodge v. National Union Investment Co., [1907] 1 Ch. 300, distinguished. Decision of Eve J., [1908] 2 Ch. 612, affirmed.

APPEAL from a decision of Eve J. (1)

The plaintiff brought this action as the trustee of the property of L. R. W. Loyd under a scheme of arrangement with his creditors. The defendant was a money-lender who carried on business in partnership with S. J. Samuel under the registered trade name of "Sydney Mostyn" at the registered address of 3, Lower Church Street, Bath, and 41, Bridge Street, Bristol. The plaintiff alleged that a mortgage dated February 14, 1905, executed by Loyd in favour of the defendant was entered into by the defendant in the course of his business of a money-lender

(1) [1908] 2 Ch. 612.

otherwise than in his registered name, and he claimed a declaration that the mortgage was illegal and void under s. 2 of the Money-lenders Act, 1900. The defendant alleged that on February 14, 1905, he lent to Loyd the sum of 2000*l.* on the security of a mortgage of that date, being the mortgage in question, upon his contingent interest in the estates of Baron Overstone, which were estimated to be of the value of 80,000*l.* a year. The mortgage was taken by the defendant in his own name and was to secure the sum of 4000*l.* with interest thereon at 20 per cent.

It appeared that on April 5, 1905, a receiving order had been made against Loyd. Thereupon a scheme of arrangement was brought forward by Loyd whereby it was proposed that all his property which would become divisible amongst his creditors if he were adjudicated a bankrupt should vest in the plaintiff as trustee under the scheme and be administered by him as if Loyd had been adjudicated bankrupt at the date of the approval thereof by the Court, and the trustee had been appointed his trustee in bankruptcy. By the scheme the property was to be applied (*inter alia*) in satisfaction and discharge of all incumbrances created by the debtor, particulars of which were set forth in a schedule, in payment of 20*s.* in the pound to all his unsecured creditors on the amount of their unsecured debts provable by them, and in payment to the debtor of any surplus remaining after payment in full of all creditors. It was also provided that on the scheme being approved by the Court the receiving order should be rescinded. The defendant was included in the schedule to the scheme as an incumbrancer in respect of the principal sum of 4000*l.* This scheme was accepted by the creditors and approved by the Court, and the receiving order was rescinded.

The defendant pleaded that the mortgage was not entered into by him in the course of his business as a money-lender; that the plaintiff ought not to be allowed in equity to dispute the validity of the mortgage because he had become a trustee for the defendant under the scheme of arrangement of the property subject to the mortgage; alternatively that the plaintiff coming into Court and seeking equity ought only to be relieved upon the basis

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that he submitted to do equity, and that it was inequitable that the plaintiff should have any relief in the action otherwise than upon the footing that he should repay to the defendant the sum of 2000*l.* with 5 per cent. interest; and he counterclaimed for a declaration that the plaintiff was an express trustee for him of the 4000*l.* and interest. At the trial the defendant admitted that the loan was made by him in the course of his business as a money-lender and offered to be satisfied with the 2000*l.* with interest at 5 per cent., but this offer was not accepted by the plaintiff. It was not proved or admitted at the trial that the 2000*l.* had been actually advanced.

Eve J. made the declaration claimed by the plaintiff without imposing any terms upon him.

The defendant appealed.

J. B. Matthews, for the appellant. The appellant is not seeking to justify the original transaction, which was grossly usurious, but by the scheme of arrangement he was scheduled as an incumbrancer for 4000*l.*, and to that extent he is entitled to recover. The transaction being originally void, it was nevertheless competent for Loyd to treat the defendant as an incumbrancer for 4000*l.* by the scheme, and as he has elected to do so, neither he nor the plaintiff can deny that that is a good security. The plaintiff's only function as trustee under the scheme of arrangement is to administer the estate in a particular way, and he is not entitled to challenge the status of any of the persons constituted cestuis que trust by the scheme. The Bankruptcy Act itself contains machinery which can be set in motion if any person is improperly included in the scheme or if the scheme ought not to be carried into effect, and the proper course was to move to strike out the defendant's name from the list of creditors. Secondly, a person who seeks equity must do equity, and therefore the Court ought to have insisted upon the plaintiff paying to the defendant the sum actually advanced by him with reasonable interest as a condition of making the declaration in the plaintiff's favour: *Lodge v. National Union Investment Co.* (1) Eve J. distinguished that case on the ground that a declaration

(1) [1907] 1 Ch. 300.

of rights is not equitable relief, but that view is erroneous. A declaration of rights was unknown to the Common Law Courts, but it could be granted by the Court of Chancery where there was a large class of people whose rights it was expedient to declare; otherwise it was only made as incidental to specific relief. Even after the Chancery Procedure Act, 1852, which by s. 50 expressly empowered the Court of Chancery to make a declaration of rights without granting consequential relief, it was not the practice of the Court as a general rule to grant a declaration simpliciter except in cases where there was some equitable relief which might be granted if the plaintiff chose to ask for it: *Jackson v. Turnley* (1); *Rooke v. Lord Kensington* (2); and under Order xxv., r. 5, where the plaintiff has a present right to relief he can only get a declaration as incidental to it. Therefore this declaratory judgment is equitable relief to which the maxim applies.

P. O. Lawrence, K.C., and *J. F. W. Galbraith*, for the respondent, were not called upon.

COZENS-HARDY M.R. I think that this appeal is quite hopeless notwithstanding the very vigorous argument we have listened to from Mr. Matthews. He starts by admitting that the mortgage for 4000*l.* is illegal and, to use his own words, a grossly usurious transaction, but he relies upon the deed of arrangement, which was executed after a receiving order had been made against Loyd, and which in terms says that the property shall be administered by the plaintiff, the trustee, as if Loyd had been adjudicated bankrupt at the date of the approval thereof by the Court and the trustee had been appointed his trustee in bankruptcy, and he says that, because Loyd had put in the schedule to the deed certain securities to the best of his knowledge, and the plaintiff has been included therein as an incumbrancer for 4000*l.*, it is not open to the trustee to investigate whether these things which the debtor has called securities are really securities or not. That proposition has only to be stated to be rejected. But then it is said that the appellant ought at least to be entitled to the sum actually advanced, which he alleges, though he has not proved it, is 2000*l.*, with reasonable interest. It is said that

(1) (1853) 1 Drew. 617.

(2) (1856) 2 K. & J. 753.

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because the plaintiff comes to the Court seeking equitable relief he must do equity, and Parker J.'s decision in *Lodge v. National Union Investment Co.* (1) is cited in support of that contention. The simple answer is that this is not equitable relief. It is a mere accident that the judgment has been given in the Chancery Division and not in the King's Bench Division, since this action might perfectly well have been brought in the Common Law Courts. To say that it is not open to the Court to declare this mortgage void without granting consequential relief is really to ask the Court to repeal Order xxv., r. 5. For these reasons I think that the judgment of the learned judge was perfectly right and that this appeal should be dismissed. I do not wish to indicate any opinion as to whether the appellant may or may not have rights as an unsecured creditor. Such rights, if any, as he has in that capacity he will be able to assert notwithstanding this judgment.

FLETCHER MOULTON L.J. I am of the same opinion. That the learned judge had jurisdiction to give a declaratory judgment without granting specific relief appears to me to be absolutely clear upon Order xxv., r. 5. That he exercised his jurisdiction rightly in giving the judgment asked for I have also no doubt. It is suggested that terms ought to have been put upon the plaintiff before the judgment was granted. I am not going to express any general opinion as to the propriety of imposing terms in such cases, but I think that in the circumstances of this case no terms ought to have been imposed. In my opinion the considerations which affect an action for true equitable relief such as was asked for in *Lodge v. National Union Investment Co.* (1) do not necessarily apply to an action for a mere declaration of rights.

FARWELL L.J. I agree. I wish to say a word with regard to Mr. Matthews's argument as to the power of the Court to make a declaratory order. He says that prior to the Judicature Act a declaratory order could not have been obtained at common law, and notwithstanding the power conferred by s. 50 of the Chancery

(1) [1907] 1 Ch. 300.

Procedure Act, 1852, could not have been obtained in equity except in very special circumstances. I think he is probably right as to that. But then he says that because by the Judicature Act the High Court, which is neither the Chancery Division nor the King's Bench Division, is empowered to give a declaratory judgment in cases where a declaratory order could only have been made by a Court of Equity, and also in other cases where it could not have been made at all, that is equitable relief. In my opinion that does not make it equitable relief. In *Ellis v. Duke of Bedford* (1) Lindley M.R. says, "Moreover now, under the Judicature Act, actions can be brought merely to declare rights, and this is an innovation of a very important kind," and then he refers to Order xxv., r. 5. It seems to me also a very important innovation, and I think that you cannot now have recourse to the old equitable practice to explain, and still less to limit, a novel practice created by the Judicature Act and a power given to the High Court and not to one division of the High Court to the exclusion of the other.

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Solicitors: *Windybank, Samuel & Lawrence; Alfred Harris & Co.*

(1) [1899] 1 Ch. 494, 514.

H. B. II.

WARRING-
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Nov. 30.

In re VIOLA'S INDENTURE OF LEASE.
HUMPHREY *v.* STENBURY.

[1908 V. 923.]

Approved. LEBK
AND MOORLANDS
BLDG. SOC. *v.* CLARK
[1952] 2 Q.B. 788

Landlord and Tenant—Lease—Proviso enabling Lessees to determine Lease by Notice—Notice by one of two Lessees—Validity.

Where a lease contains a proviso enabling the “lessees” to determine the lease by notice, a notice given by one of two lessees will not, in the absence of evidence of authority from the other lessee to give it or of circumstances from which the Court can infer such authority, be effectual to determine the lease.

Doe v. Summersett, (1830) 1 B. & Ad. 135, distinguished.

ORIGINATING SUMMONS.

By an indenture of lease dated February 2, 1906, and made between O. F. Viola (thereinafter called the lessor) of the one part and Ernest George Humphrey and Ellen Ann Humphrey, his wife (thereinafter called the lessees), of the other part, certain premises forming part of No. 13 New Bond Street were demised to the lessees for a term of fifteen and three-quarter years from December 25, 1905. The lease contained a proviso that if “the lessees” should be desirous of terminating the lease at the end of the first three years of the term, and of such desire should give to the lessor six months’ previous notice in writing, then at the end of such three years the term thereby granted should cease.

In pursuance of the lease the lessees entered into possession of the premises and carried on there the business of ladies’ tailors under the style of “E. Humphrey.”

On October 3, 1907, E. G. Humphrey, the husband, alone gave notice in writing to the lessor to determine the lease at the end of the first three years of the term. The lessor did not accept the notice and did nothing to admit its validity.

The present summons was taken out by the lessees for the determination of the question whether an effective notice to

determine the lease at the end of the first three years had been given. WARRINGTON J.

The matter came before the Court on an agreed statement of facts, from which it appeared that the two payments of rent for the quarters ending June 25 and September 29, 1907, were made by the husband.

Several objections were taken to the form of [the] notice to determine by the defendant, but the only matter calling for a report was whether the notice was valid having regard to the fact that it was given by one only of the two joint lessees.

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Whitmore Richards, for the plaintiffs. A notice given by one of two joint tenants is a good notice on behalf of both and is binding upon both: *Doe v. Summersett*. (1) The only distinction between that case and the present is that in the former the tenancy was from year to year.

[WARRINGTON J. I do not think that case has any bearing upon the present case. The decision there proceeded on the ground of joint tenancy and not on any theory of agency. *Right v. Cuthell* (2) seems much more like your case.]

There the notice had to be under the hands of the persons giving it.

Where a husband and wife, as here, carry on business together, the presumption is that a notice given by the husband is for the benefit of the wife, and the Court will infer from the facts of the case that the husband was in fact the wife's agent to give the notice: *Jones v. Phipps*. (3) The Court is not precluded from drawing inferences of fact by reason of the procedure being under Order LIV. A: *Nicholls v. Nicholls*. (4)

[WARRINGTON J. You ask me to infer from the fact of the husband paying the rent an authority from the wife to determine the lease.]

It is submitted that the Court will infer that the husband had a general authority from the wife to determine the lease.

[WARRINGTON J. The proviso enabling the lessees to determine the lease is a privilege which must be exercised by them in

(1) 1 B. & Ad. 135.

(3) (1868) L. R. 3 Q. B. 567.

(2) (1804) 5 East, 491.

(4) (1899) 81 L. T. 811.

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accordance with its terms. You want me to read the words "if the lessees" in the proviso as if they were "if either of the lessees."]

[He also referred to *Doe v. Chaplin*. (1)]

Sheldon, for the defendant, was not called upon.

WARRINGTON J. The question I have to decide in this case is as to the validity of a notice to determine a lease at what has been called the end of the first break. [His Lordship, after stating the facts and referring to the various objections that had been raised to the form of the notice, continued :—] I need not, however, deal with those objections, because there is a much more serious one which is absolutely fatal to the validity of the notice, namely, that the notice was given by one only of the two lessees. The argument on behalf of the lessees is put in two ways. First it is said that a notice given by one of two joint lessees is itself a good notice for both of them. In support of that proposition reference is made to *Doe v. Summersett* (2), but in my judgment that case has no bearing on the case before me. There a person held certain premises as tenant from year to year from certain lessors who were joint tenants, and a notice to quit was given to him by one of them on behalf of all. The question there was not whether the notice was a good one so far as the particular share of the tenant giving the notice was concerned, but whether at common law, regard being had to the nature of the estates of joint tenants, a notice to quit by one of them was a sufficient notice to determine the tenancy as to all. Lord Tenterden C.J., after remarking that "joint tenants are seised not only of their respective shares, per my, but also of the entirety, per tout," goes on to say, "Upon a joint demise by joint tenants upon a tenancy from year to year, the true character of the tenancy is this, not that the tenant holds of each the share of each so long as he and each shall please, but that he holds the *whole* of *all* so long as he *and all* shall please." If, therefore, any one of them no longer pleases, there is an end of the tenancy. That case only decided that at law in the absence of express terms a notice to quit by one joint tenant is good. The case turned upon the

(1) (1810) 3 Taunt. 120.

(2) 1 B. & Ad. 135, 140.

effect of a tenancy from year to year and the nature of the estates of joint tenants at common law, and is not the same as this case, in which the question is whether the notice to quit is good within the terms of the proviso in the lease. The terms of the proviso are express; both lessees must be desirous and express their desire to determine the lease. A notice therefore by one of them cannot be a notice by both to determine the lease.

There remains only the question whether if notice is given by one of two joint lessees on behalf of both it may be a good notice for both. But in order to have that effect there must be facts from which the Court can infer an agency or facts which expressly prove an agency. No attempt has been made in this case to prove agency. The only facts from which I am asked to infer an agency are the two payments of rent by the husband and the fact that the notice was sent by the husband. But the absence of authority from the wife to the husband to give the notice is as consistent with those facts as the existence of authority to do so. I must therefore declare in answer to the summons that in the events which have happened and upon the true construction of the lease no effective notice to determine the term thereby created pursuant to the provisions thereof for determination has been given.

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Solicitors: *Arthur H. Dabbs & Son; Bartlett & Gluckstein.*

W. I. C.

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[1908 D. 1656.]

Dec. 3.

Company—Shareholders' Address Book—Right of Shareholder to Copy—Action to enforce Right—Inquiry into Motives of Applicant—Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 10.

The right given to a shareholder by s. 10 of the Companies Clauses Consolidation Act, 1845, to require the company to supply him with a copy of the shareholders' address book is a private right conferred on him by statute by reason of his being a member of the company and not as being a member of the public. The appropriate remedy, therefore, in the event of the company refusing to supply him with a copy is not a prerogative writ of mandamus, but either an injunction to restrain the company from continuing to refuse to supply him, or an action of mandamus or for a mandatory injunction directing the company to supply him. In granting such relief the Court has no jurisdiction to inquire into the motives of the applicant.

Holland v. Dickson, (1888) 37 Ch. D. 669, and *Mutter v. Eastern and Midlands Ry. Co.*, (1888) 38 Ch. D. 92, applied.

WITNESS ACTION.

The Gas Light and Coke Company was incorporated in 1868 by a special Act (31 & 32 Vict. c. cvi.). The Act consolidated the previous Acts relating to the company and by s. 2 incorporated the Companies Clauses Consolidation Act, 1845.

By s. 3 of the Companies Clauses Consolidation Act, 1845, "shareholder" is defined to mean "shareholder, proprietor, or member of the company," and by s. 9 the company is required to keep a book, to be called the "register of shareholders."

Sect. 10 provides that "In addition to the said register of shareholders, the company shall provide a book, to be called the 'shareholders' address book,' in which the secretary shall from time to time enter in alphabetical order the corporate names and places of business of the several shareholders of the company, being corporations, and the surnames of the several other shareholders with their respective christian names, places of abode, and descriptions, so far as the same shall be known to the company; and every shareholder, or if such shareholder be a

corporation the clerk or agent of such corporation, may at all convenient times peruse such book gratis, and may require a copy thereof or of any part thereof; and for every hundred words so required to be copied, the company may demand a sum not exceeding sixpence."

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By s. 61 the company is empowered to consolidate its shares into stock, and by s. 64 it is provided that holders of stock are to be entitled to the same privileges and advantages as shareholders.

Under the power conferred by s. 61 the Gas Light and Coke Company had consolidated its shares into stock, and there were now no shares in existence, the whole of the capital of the company being represented by stock.

Hubert Percy Davies, who was the holder of 100*l.* stock in the company, in pursuance of the right given him by s. 10 of the Act of 1845 applied to the company for a copy of the shareholders' address book and offered to pay the expenses of making it. The company, believing that the applicant intended to use the copy for a purpose which it was alleged was not contemplated by the Act, declined to supply him with one. Thereupon, on October 15, 1908, the applicant issued his writ in the present action, claiming a mandamus commanding the company to supply him with a copy of the corporate names and places of business of the several shareholders of the company, being corporations, and the surnames of the several other shareholders, with their respective christian names, places of abode, and descriptions so far as the same might be known to the company.

The action was tried before Warrington J. on December 3, 1908, with witnesses without pleadings.

H. Terrell, K.C., and *E. W. Lavington*, for the plaintiff. The form of action in the present case was introduced by the Common Law Procedure Act, 1854, and was continued by s. 25, sub-s. 8, of the Judicature Act, 1873. It is wholly distinct from the proceedings for a prerogative writ of mandamus. It is in aid of a civil right and depends upon principles analogous to those upon which injunctions are granted. It has been held that, a prerogative writ being entirely discretionary, the Court, on an application by a shareholder to see accounts, was entitled to ask

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what his motives were in requiring to see them : *Reg. v. London and St. Katharine's Docks Co.* (1) That was because a prerogative writ was only issued when there was no other remedy. But since the passing of the Common Law Procedure Act, 1854, and still more since the Judicature Act, 1873, the principles which guide the Court in the issue of a prerogative writ have no longer any application. If by statute or by contract a person has a right to have an act done, he is entitled as of right to a mandamus, whatever may be the object for which he desires the act to be done : *Holland v. Dickson* (2) ; *Mutter v. Eastern and Midlands Ry. Co.* (3) Those cases are clear authorities that the plaintiff, whatever his object may be, has the right, given to a shareholder by the statute, to have a copy of the shareholders' address book on paying the proper charges, and that the Court has no jurisdiction to inquire into his motives.

In support of the plaintiff's case the plaintiff's solicitor was called, who proved the signature of the plaintiff to certain letters of application to the company for a copy of the list. Counsel for the defendant company in cross-examination proposed to put certain questions to the witness with a view of eliciting the motives of the plaintiff in requiring the copy. Objection was thereupon taken to them by the plaintiff's counsel on the ground that the motives of the plaintiff could not be inquired into.

[WARRINGTON J. Counsel for the defendant company must convince me on the authorities that they can go into any such matter as this.]

Rowden, K.C., and *R. J. Neville*, for the company. Both *Holland v. Dickson* (2) and *Mutter v. Eastern and Midlands Ry. Co.* (3) were cases of injunction and not of mandamus. The present action is for what has been called a private mandamus and is really equivalent to an application for a prerogative writ.

[WARRINGTON J. There is very little difference now between an injunction and a mandamus of this kind.]

We put our case in two ways. First we say that the plaintiff's

(1) (1874) 31 L. T. 588.

(2) 37 Ch. D. 669.

(3) 38 Ch. D. 92.

claim is not a proper subject for an action of mandamus at all, and secondly, if it is, that such an action will be subject to the same rules as obtained in regard to a grant of the old prerogative writ of mandamus, and consequently that the Court has jurisdiction to inquire into the motives of the plaintiff.

First, the right here sought to be enforced is a public and not a private right, and an action of mandamus under Order LIII., r. 1, therefore, is not the appropriate remedy: *Smith v. Chorley District Council* (1); *Reg. v. London and St. Katharine's Docks Co.* (2)

The plaintiff's right is a right created by statute, and the proper remedy before the passing of the Judicature Act, 1873, would have been by prerogative writ. *Reg. v. London and St. Katharine's Docks Co.* (2) is exactly in point. There a company had refused the plaintiff the right given him by the Companies Clauses Consolidation Act, 1845, to inspect the books of the company, and it was held that the appropriate remedy for the refusal was a prerogative writ. It is not necessary for us to contend that the prerogative writ is the only remedy. It is sufficient that it has for many years been recognized as being the appropriate remedy, and, that being so, the new action of mandamus will not lie. The essence of the old prerogative writ was that it must be applied for to enforce the performance of a public duty.

[WARRINGTON J. Is there any case in which a prerogative writ of mandamus has been granted to enforce the performance by a company of a duty of this sort?]

Yes; the authorities shew that that is the appropriate remedy: *Reg. v. London and St. Katharine's Docks Co.* (2); *Rex v. Wilts and Berks Canal Navigation* (3); *Reg. v. Bank of England* (4); *Bush v. Beavan* (5); Short and Mellor's Crown Office Practice, 2nd ed. p. 208. A prerogative writ was never granted where there was an available remedy by action.

Secondly, assuming that an action of mandamus is the appropriate remedy, it is submitted that the rules with regard to

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(1) [1897] 1 Q. B. 532.

(3) (1835) 3 Ad. & E. 477.

(2) 31 L. T. 588.

(4) [1891] 1 Q. B. 785.

(5) (1862) 32 L. J. (Ex.) 54.

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the prerogative writ are applicable. It is not a sound view that Order LIII. merely enables the Court to grant a positive injunction instead of a negative one, though it may include this. If the principles applicable to the case of a prerogative writ apply to an action of mandamus, the Court has a wide discretion as to granting the application and before so doing will ascertain the motives of the applicant, and if not satisfied will refuse to grant the writ: *Reg. v. Churchwardens of All Saints, Wigan*. (1)

[WARRINGTON J. If I have to deal with this case on the same principles as on an application for a prerogative writ, no doubt the matter is absolutely in my discretion, and in that case I must hear all the facts.]

There is not a single reported case which suggests that the principles on which a mandamus is granted in an action differ in any respect from those on which a prerogative writ is granted.

H. Terrell, K.C., in reply, referred to *Reg. v. Lambourn Valley Ry. Co.* (2) and *Lindley on Companies*, 6th ed. p. 811.

WARRINGTON J. This is an action by the plaintiff, who has proved that he is the holder of stock in the defendant company, asking for a mandamus commanding the defendant company to supply him with "the corporate names and places of business of the several shareholders of the defendant company, being corporations, and the surnames of the several other shareholders, with their respective christian names, places of abode, and descriptions, so far as the same shall be known to the defendants." The action is brought for the purpose of enforcing this right, which is given to him by s. 10 of the Companies Clauses Consolidation Act of 1845. [His Lordship read the section, and continued:—] The plaintiff has proved that he applied for a copy of the shareholders' address book. He alleged, and was prepared to prove, that he had been refused that copy. In order to prove his application for a copy, he called his solicitor, who proved his signature to certain letters containing his application and proved a certain interview with the defendants' solicitors over the telephone. The defendant company then proposed to cross-examine the solicitor and to ask a question which was directed to ascertaining

(1) (1876) 1 App. Cas. 611.

(2) (1888) 22 Q. B. D. 463.

what were the motives of the plaintiff in asking for the copy of the shareholders' address book. An objection was made to the question, and Mr. Rowden, for the defendant company, frankly admitted the object of the cross-examination on which he was entering. I thought it right, in order to avoid a waste of the public time, to call on Mr. Rowden to justify that line of cross-examination; for it seems to me that where cross-examination is not directed to credit, but is directed to ascertaining certain facts on which the cross-examining party relies, if it is clear that these facts would be irrelevant, it is then the duty of the Court, in order to avoid waste of time, to stop such cross-examination. Accordingly the defendant company has sought to establish that it is relevant to the issue in the present action to enter into the motives of the plaintiff in applying for relief, and the question which I have to determine now is whether the line of cross-examination would be relevant.

Now the way in which it is put for the defendant company is this: It is said that this application is one which might have been made in the form of an application for a prerogative writ; that if it had been made in that form the Court would have had an absolute discretion as to the granting of that prerogative writ, and that, having regard to numerous authorities, would in that case have entered into the motives of the applicant, and if not satisfied of those motives would, in the exercise of its discretion, have refused to grant the writ. On the other hand it is said that this is not an application for a prerogative writ, and that it is immaterial whether the application could have been so made and whether relief could have been obtained in that form; that it is an action by which the plaintiff seeks to enforce a private right which is conferred upon him by statute, and that this private right is one which, on the authorities, could certainly be enforced by injunction; and that there is no substantial difference between an injunction, which is an order which prevents the company from doing something which would interfere with the exercise of the private right, and a mandamus or mandatory injunction, which commands the company positively to give effect to that to which he is entitled. In my opinion, on this point the plaintiff is right. I need not read s. 10 again, but I

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think on that section it is clear that the right which is conferred is one which is conferred upon the plaintiff by reason of his being the holder of stock in the company. It is a right incidental, therefore, to the property of which he is possessed as the holder of that stock. It is not given to him as one of the public; it is given to him simply as a stockholder in the company. It is a right which is incidental to his private right of property, and it is therefore a private individual right of the plaintiff, and one with which the public have nothing to do. That this is so, on the authorities with regard to the right of inspection, is, I think, quite plain. It is clearly established that where an injunction is asked for in support of such a private right, there the Court has no title to inquire into the motives of the person who seeks to enforce that private right.

Two cases have been referred to. The first of these is *Holland v. Dickson* (1), before Chitty J. The head-note is this: "The right given to holders of stock and debentures by the Companies Clauses Act, 1845, ss. 45, 63, and by the Companies Clauses Act, 1863, s. 28, of inspecting the registers of a company, is not confined to an inspection of the names and addresses only of the holders of stock and debentures,"—this is the important point—"may be exercised without assigning any reason for requiring inspection, and can be enforced by an injunction restraining interference by the company with the stockholder in the exercise at all reasonable times of his statutory right, without his being compelled to apply for a mandamus calling upon the directors to allow inspection." Two points are decided there. The first is that an action of the ordinary description will lie for the infringement of that right of inspection, and the second is that in such an action the motives of the plaintiff are immaterial. Chitty J., after reading s. 45 of the Companies Clauses Consolidation Act, 1845, says (2): "If a stockholder asked to see that book at a time which was not reasonable, then the company, of course, would be entitled to refuse to comply for the time being with his application. But there is not a word to be found in the section as to reasonable grounds, and I decline to construe the section by putting in such words. It seems to me

(1) 37 Ch. D. 669.

(2) 37 Ch. D. 672.

that would be an erroneous construction of the section. The argument for the defendant company was founded upon some observations which fell from the judges of the Court of Queen's Bench in deciding a question which arose in *Rex v. Wilts and Berks Canal Navigation*. (1) There, the question being one of fact—whether there had been a refusal—it was held and decided that there had been no refusal. In considering the question whether there had been a refusal some observations undoubtedly fell from the judges to the effect that when a demand is made the person to whom it is made should be informed bona fide of the object of that request, but I am satisfied that though there are observations of that kind, which I shall not criticize one way or the other, but will accept loyally with reference to the point of fact whether there had been a refusal or not, it was not intended by the judges, and could not have been intended, to import into the statute (which contains words very similar to those in the one before me) something to prevent inspection which was not to be found in the statute. The right, then, is to have access to the book, and the directors of the company are wrong in saying that the plaintiff shall have access to part only of the book when the right of access is not so limited by the statute." The learned judge does not there point out what is pointed out in a subsequent case, that *Rex v. Wilts and Berks Canal Navigation* (1) was an application for a prerogative writ, and that fact explains the remarks which were made by the judges in that case as to the motives of the then applicant. But he goes on to say: "Then it was contended that the remedy in this case was by mandamus, and *Glossop v. Heston and Isleworth Local Board* (2), which deals with the subject of prerogative mandamus, was cited. This, however, is not a case in which the writ of prerogative mandamus would apply, but simply the case of a private owner of stock with a statutory right to see the books, and of an interference by the defendants with that statutory right. It seems to me to follow that when the statutory right of an individual is interfered with an injunction would have been granted by the old Court of Chancery, and at any rate ought now to be granted by the High Court.

(1) 3 Ad. & E. 477.

(2) (1879) 12 Ch. D. 102.

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I therefore grant the injunction as asked, but the words ‘at all reasonable times’ must be inserted in the order.” The important part of the judgment is almost the last sentence, in which Chitty J. points out that that was not a case (it was only for inspection) in which a prerogative writ would lie, but it was one in which an action would lie for the infringement of a private right.

The matter came again before Chitty J. in the first instance, and afterwards before the Court of Appeal in *Mutter v. Eastern and Midlands Ry. Co.* (1) The head-note is this: “The right of inspection and perusal of the register of debenture stockholders, which by s. 28 of the Companies Clauses Act, 1863, is given to mortgagees, bondholders, debenture stockholders, shareholders, and stockholders of the company, includes a right to take copies. The fact that a person has taken his stock in a company at the instance of a rival company, and for the purpose of serving the interests of the rival company, does not disentitle him to the assistance of the Court in enforcing this statutory right.” That raises in a very pointed manner the question of motives. What Chitty J. says there is this (2): “The result of the authorities I think now is clear that whatever the Court or judge individually may think of the merits of the applicant, he cannot be denied the rights which the Legislature has conferred upon him as the holder of stock. The Court may see that the man, though he bought the stock nominally in his own interest, has really taken it in the interest of some other person. But as the company is not bound by any such trust, but can only look, and must look, to the register, for the purpose of the liabilities, this applies to the rights of the stockholder himself.” He then illustrates what he has been saying by reference to the case of *Pender v. Lushington* (3), which dealt with the question how far a man’s motives might be inquired into with reference to his right to vote, and he again states (4) his view of the matter: “I think he”—the plaintiff—“is acting to a large extent in the interest of the Great Eastern Railway Company, but it appears to me on the authorities that I am not justified in going behind

(1) 38 Ch. D. 92.

(2) *Ibid.* 95.

(3) (1877) 6 Ch. D. 70.

(4) 38 Ch. D. 96.

the register. Even if I came to the conclusion that I did not like the position of the plaintiff in this particular matter, I should have no right to refuse to do him justice or accord him the rights which the Legislature has given him. The argument therefore as to 'personal exception' to the plaintiff fails." The matter came before the Court of Appeal, and the judges of that Court dealt more particularly, I think, with the right to take copies. But there are some observations in Lindley L.J.'s judgment to which I ought to refer. But before I come to that, Bowen L.J. in the course of the argument for the appellant remarked, with reference to *Reg. v. London and St. Katharine's Docks Co.* (1), which was referred to as shewing that the Court had and ought to exercise a discretion, "That was an application for a prerogative writ of mandamus, which may make a difference. There is a discretion as to granting such a writ." In delivering the judgment of the Court Lindley L.J. says (2): "The grounds on which it was urged that this was not a case in which the Court would interfere on the plaintiff's behalf were two; first it was said that he was not really a bona fide shareholder or debenture stockholder, but that he was merely a nominee of a rival company, namely, the Great Eastern; and secondly, it was said that there was such a want of candour in his affidavit, which was exposed on cross-examination, that he personally was not one in whose favour the Court ought to interfere. Now the fact that he has taken both the shares and the debenture stock at the instance of the Great Eastern Railway Company is made out by the cross-examination, but at the same time he is unquestionably in point of law both a shareholder and a debenture stockholder; he therefore has the rights, whatever they may be, of a shareholder and a debenture stockholder, and whether he is trustee for other people we cannot inquire. I agree with Mr. Justice Chitty in thinking that the plaintiff is not on that ground debarred from insisting on his legal rights." The Lord Justice winds up by dealing with a case which had been cited to him, in which a nominee of a rival company had instituted a suit in his own name on behalf of himself and all other shareholders, and points out that the case

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(1) 31 L. T. 588.

(2) 38 Ch. D. 103.

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before the Court was not an action by the plaintiff on behalf of himself and others, but was an action brought by him in his own personal interest, and did not profess to be anything else. The conclusion the Court came to was in accordance with that to which Chitty J. had come.

It seems to me quite clear that if the plaintiff had merely asked here for an injunction restraining the company from refusing to allow him to inspect, the Court would have had no option in the matter, and, on his proving that he was a shareholder and that the company had refused to allow him inspection, would have been bound to grant an injunction restraining them from continuing that refusal. Now, is there really any difference between that case and the present one, where the relief which the plaintiff asks is that the company may be directed to deliver to him copies? So far as the section is concerned, I can find no distinction at all. The right to obtain a copy on paying the proper fees is as much incidental to his ownership of the stock as his right to obtain inspection, and I think it is extremely doubtful—I say no more than that—whether, having regard to the decision in the case of *Reg. v. Lambourn Valley Ry. Co.* (1), an application for a prerogative writ of mandamus would have lain at all. But assuming that it would have lain, am I bound to treat this application for a mandamus in an action on the same footing as I should have had to treat a prerogative writ? I think I am not. Assuming that an action for mandamus would lie—and as to that I entertain no doubt at all, for the reason which I have mentioned, namely, that it is intended to enforce a right incidental to a private right of property—I think I am certainly not bound by the rules which governed the old Court of Queen's Bench in dealing with an application for the issue of a prerogative writ of mandamus.

In *Baxter v. London County Council* (2), in a passage quoted by Kennedy J. in *Smith v. Chorley District Council* (3), Day J. says: "The true and only remedy which the plaintiff has for the purpose of enforcing the rights which I am of opinion he has got is by a prerogative writ of mandamus. When I objected that this was a matter for a mandamus, I was answered that this was an action

(1) 22 Q. B. D. 463. (2) (1890) 63 L. T. 767.

(3) [1897] 1 Q. B. 532, 539.

for a mandamus. It is an action for a mandamus based upon the Common Law Procedure Act, 1854, and the action for a mandamus is simply an attempt to engraft upon the old common law remedy a right in the nature of specific performance. When private persons had rights one against the other, the Court had power to grant a mandamus or direct specific performance, or something in the nature of an injunction"—so he puts the three on the same footing—"to command that the right claimed by the one party should be acceded to by the other. But it was never contemplated that the action for a mandamus was to supersede the prerogative writ of mandamus. In this case no action will lie. I am perfectly clear that this is not an action which will lie between the parties, or a case in which a statutory mandamus will be applicable, because no action would lie, and a mandamus is only granted as ancillary to the action, and for the purpose of enforcing the private right in respect of which the private litigation had arisen." I think it is there made quite clear what is the distinction between a prerogative writ and a mandamus granted in an action brought to enforce a certain private right. Much reliance was placed on the case of *Smith v. Chorley District Council* (1) in which the words of Day J. were quoted. But that was a case which was clearly one to which the prerogative writ of mandamus was applicable, and Kennedy J. decided there that it was not one in which an action of mandamus could be brought. It was an action brought not to enforce a private right, but to compel a public body, the district council, to perform its public duty, and it was on this ground Kennedy J. held that the action of mandamus would not lie, but that the proper remedy was by applying for a prerogative writ of mandamus.

In the present case I am of opinion, on the two authorities of *Holland v. Dickson* (2) and *Mutter v. Eastern and Midlands Ry. Co.* (3), that the action will lie. I can find no distinction in principle between granting an injunction to restrain a company from interfering with the right and granting an affirmative order compelling a company to grant the right. On these grounds I think any inquiry into the motive of the plaintiff

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(1) [1897] 1 Q. B. 532, 539.

(2) 37 Ch. D. 669.

(3) 38 Ch. D. 92.

WARRINGTON J. would be irrelevant, and I must therefore not allow the questions which Mr. Rowden proposed to put.

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—

Rowden, K.C. I have no further questions to put to the witness, and I will admit that the plaintiff is a stockholder, to save time. I should like to put the chairman of the company into the box, but am afraid that, on the question of the admissibility of evidence, I have really argued the case.

WARRINGTON J. I should have to rule that it was irrelevant. I will take it that evidence is tendered to shew what motives the company had for refusing, and I refuse it. After what has been said, there is no doubt that a great company like the one in the present case refused in the bona fide belief that the plaintiff's motives were not proper.

Rowden, K.C. That is the position I take up. I formally tender the evidence, but it seems to me to be covered by what your Lordship has decided.

WARRINGTON J. I must give judgment for the mandamus, with the costs of the action.

Solicitors: *Jordan & Lavington ; Monier-Williams, Robinson & Milroy.*

W. I. C.

COOPER v. MORGAN.

[1908 C. 771.]

WARRINGTON J.

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Dec. 5.

Vendor and Purchaser—Practice—Sale of Real Estate—Vendor's Action for Specific Performance—Title accepted and Conveyance approved—Form of Order.

Where a motion for judgment in default of defence is made in a vendor's action for specific performance of an agreement for the sale of real estate, the title to which has been accepted by the purchaser, the minutes should provide for the delivery of a conveyance of the property to the purchaser on payment by him of the purchase-money, interest, costs, and damages (if any).

Form 6 in 3 Seton on Judgments and Orders, 6th ed. p. 2240, amended in this respect.

MOTION for judgment in default of defence.

The action was brought by the plaintiffs for specific performance of an agreement dated July 1, 1905, for the sale by them to the defendant of certain freehold property in the parish of Llanbadarnfawr, in the county of Cardigan, and for damages for breach of contract.

The statement of claim alleged that the defendant had paid a deposit on signing the agreement and had entered into and remained in possession of the premises, that the title to the property had been accepted by him, and that a conveyance thereof had been approved by the plaintiffs and the defendant.

Judgment was now asked in the terms of the minutes annexed to the notice of motion.

The defendant did not appear.

H. B. Betterton, for the motion.

[WARRINGTON J. The minutes do not provide for the delivery of the conveyance to the defendant.]

The minutes follow form 6 in 3 Seton on Judgments and Orders, 6th ed. p. 2240, which is based upon the order made by Kekewich J. in *Stone v. Smith*. (1)

(1) (1887) 35 Ch. D. 188.

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WARRINGTON J. It cannot be right to order a purchaser to pay his purchase-money without giving him his conveyance. I think Kekewich J. must have intended to incorporate the provisions in the form in *Stone v. Smith* (1) into the common form order which provides for the delivery of the conveyance, and not that they should stand by themselves. It does not appear from the report of the case that the minutes were settled by Kekewich J. himself. How they came to be in that form I do not know. The minutes must go in the usual form of a vendor's order for specific performance where the title has been accepted.

The order as passed and entered (omitting formal parts) was as follows: "This Court doth declare that the agreement dated the 1st day of July 1905 and made between the plaintiffs of the one part and the defendant of the other part ought to be specifically performed and carried into execution and Doth order and adjudge the same accordingly, and It is ordered that (1.) an inquiry be made what damages have been sustained by the plaintiffs by reason of the defendant not having specifically performed the said contract, and It is ordered that the following account be taken that is to say (2.) an account of what is due to the plaintiffs for balance of the purchase-money due under the said agreement and for interest thereon and It is ordered that the costs of the plaintiffs of this action be taxed by the taxing Master. And it appearing that the defendant has accepted the title to the said hereditaments and the conveyance thereof has been approved by the plaintiffs and the defendant It is ordered that upon the delivery by the plaintiffs [naming them] to the defendant of the said conveyance of the said hereditaments duly executed by them together with all deeds and writings in their custody or in their power relating to the said hereditaments exclusively and upon their giving an acknowledgment and undertaking for safe custody of deeds relating to other properties (if any) as provided by the 9th section of the Conveyancing and Law of Property Act, 1881, the defendant John Morgan do pay to the plaintiffs the amount that shall be certified to be due in

(1) 35 Ch. D. 188.

respect of the balance of purchase-money interest and costs and such damages as aforesaid. And any of the parties are to be at liberty to apply as they may be advised."

Solicitor: *T. B. Rutherford, for G. Ashmall, Lichfield.*

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In re WOOD GREEN GOSPEL HALL CHARITY.

Ex parte MIDDLESEX COUNTY COUNCIL.

[1908 W. 0107.]

WARRINGTON J.

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Dec. 12.

Charity—Land taken by Local Authority under Compulsory Powers—Payment of Purchase-money into Court—Scheme for Administration of Charity—Transfer of Money in Court to Official Trustees of Charitable Funds—Costs of Application for Scheme—Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 80.

Where a local authority in pursuance of the compulsory powers conferred upon them by the Lands Clauses Consolidation Act, 1845, take land belonging to a charity, and as a direct result of the taking of such land the trustees of the charity apply to the Charity Commissioners for a new scheme for the regulation of the charity, the costs of the trustees so incurred fall within s. 80 of the Act and are payable by the local authority.

PETITION asking for the transfer and payment to Official Trustees of Charitable Funds of money paid into Court by the Middlesex County Council in respect of the Gospel Hall at Wood Green, compulsorily purchased by them for the purposes of works authorized by the County of Middlesex Light Railways Order, 1903.

By an indenture dated June 10, 1874, a piece of land at Tottenham, with an iron building or hall standing thereon, subsequently known as "The Gospel Hall at Wood Green," was conveyed to trustees upon trust for certain religious and charitable purposes therein mentioned. The deed contained no power to the trustees to sell the land and premises thereby conveyed.

On March 26, 1906, the county council, under the County of Middlesex Light Railways Order, 1903 (which incorporated

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therewith the Lands Clauses Consolidation Act, 1845), gave to R. C. Morgan and G. E. Morgan, the then trustees of the charity, notice to treat for the purchase of the land and premises comprised in the deed of 1874. The trustees and the county council having failed to agree as to the amount of the compensation to be paid by the county council to the trustees in respect of their estate and interest, an arbitrator was appointed to determine the matters in difference.

On April 18, 1907, the arbitrator made his award, by which he awarded that the sum of 1329*l.* should be paid by the county council to the trustees for the purchase of their estate and interest in the land and premises and for all compensation for damage by reason of the taking of the land, and also for certain fixtures therein referred to, and for damage to fittings and the removal thereof.

On September 13, 1907, the county council paid the 1329*l.* into Court to the credit of "*Ex parte* the County Council of Middlesex, In the matter of the County of Middlesex Light Railways Order, 1903. The vendors Richard Cope Morgan and George Ernest Morgan, trustees without power of sale."

By an indenture of the same date the land and premises were duly conveyed by the trustees to the county council in fee simple.

The trustees after consideration determined that the religious and charitable objects upon trust for which the land and premises had been held could be best carried into effect if the 1329*l.* were expended otherwise than in the purchase of a fresh site and the re-erection of a hall or room thereon, and on March 17, 1908, applied to the Charity Commissioners for an order establishing a scheme for the administration of the charity.

On June 3, 1908, the Charity Commissioners informed the trustees that they would be prepared to publish a scheme, and that pending the establishment of the proposed scheme it would be convenient to have the fund in Court transferred into the corporate name of the Official Trustees of Charitable Funds, in trust for the charity, and by a certificate under their seal dated July 21, 1908, they authorized the trustees to apply within six

months for an order directing payment out of the money in Court to the Official Trustees of Charitable Funds.

On October 29, 1908, R. C. Morgan died.

On November 14, 1908, G. E. Morgan, the surviving trustee, received from the Charity Commissioners a printed draft of the scheme prepared by them for the administration of the charity. The scheme had been duly advertised without any objections having been received, but it had not yet been formally sealed and published by the Charity Commissioners.

The present petition was presented by G. E. Morgan asking (1.) that out of the money on deposit in Court the taxed costs, charges, and expenses of the petitioner and R. C. Morgan (if any) not ordered to be paid by the county council might be paid, and the residue paid to the banking account at the Bank of England of the Official Trustees of Charitable Funds, and (2.) that pursuant to s. 80 of the Lands Clauses Consolidation Act, 1845, the county council might be ordered to pay the costs of R. C. Morgan, the deceased trustee, and the petitioner as thereby provided for, including therein all reasonable charges and expenses of and incident to the scheme down to and including the sealing thereof by the Charity Commissioners and of and incident to the petition and all proceedings relating thereto.

L. W. Byrne, for the petition. The only question is as to the trustees' costs of obtaining the scheme, and it is submitted that they ought to be included in the costs of the petition and paid by the county council under s. 80 of the Lands Clauses Consolidation Act, 1845. The scheme formed a necessary part of the Official Trustees' title. *In re St. Paul's Schools, Finsbury* (1), is distinguishable. There the new scheme was not, as here, the direct result of the taking of the land.

G. E. Timins, for the Middlesex County Council. It is submitted that the order to be made ought to follow form 3 in 3 Seton on Judgments and Orders, 6th ed. p. 2443, which is based on *Attorney-General v. St. John's Hospital, Bath* (2), following *In re Rector and Churchwardens of St. Alban's, Wood Street* (3), although

(1) (1883) 52 L. J. (Ch.) 454; 31 W. R. 424.

(2) [1893] 3 Ch. 151.

(3) (1891) 66 L. T. 51.

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the actual point now raised was not argued in either of those cases. The costs of the scheme here are too remote to be the reasonable consequence of the purchase, and they are not costs of reinvestment. The scheme was not a necessary part of the Official Trustees' title. The only case in which the point has been raised is *In re St. Paul's Schools, Finsbury* (1), where the facts were parallel with those in the present case. There, as here, the trustees came to the conclusion that it was not worth while to purchase a new site and erect a new building thereon, and therefore applied for a scheme, but Fry J. refused to order the local authority to pay the costs of the scheme.

WARRINGTON J. stated the facts, and continued:—The only question which arises on this petition is whether the costs of the application to the Charity Commissioners for the scheme ought to be paid by the county council. What the county council have to pay under s. 80 of the Lands Clauses Consolidation Act, 1845, are “the costs of the purchase or taking of the lands, or which shall have been incurred in consequence thereof . . . and the costs of the investment of such monies in Government or real securities, and of the reinvestment thereof in the purchase of other lands, and also the costs of obtaining the proper orders for any of the purposes aforesaid, and of the orders . . . for the payment out of Court of the principal of such monies . . . and of all proceedings relating thereto, except such as are occasioned by litigation between adverse claimants.” The question which I have to determine is whether in this case, whatever may be the decision in another case, the costs of obtaining this scheme are (1.) “costs which have been incurred in consequence of the purchase or taking of the lands” or (2.) costs of an order for payment out of Court or of “proceedings relating thereto.” I think in this case that the costs in question fall under both of these heads. They “have been incurred in consequence of the purchase or taking of the lands” because the taking of the land rendered it necessary to formulate a new scheme for the charity, and they are costs of proceedings relating to payment out of Court because they have been incurred in appointing or providing a proper

(1) 52 L. J. (Ch.) 454; 31 W. R. 424.

hand to receive the money to be paid out. I am aware that in *WARRINGTON J.*
In re St. Paul's Schools, Finsbury (1), Fry J. upon the facts of 1908
 that case held that the local authority were not liable to pay the WOOD
 costs of obtaining a scheme; but on the facts of this case I think GREEN
 that the county council ought to pay the costs in question as GOSPEL
 asked by the petition. HALL
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Solicitors: *T. H. Mundell; Sir Richard Nicholson.*

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MARSHALL'S VALVE GEAR COMPANY, LIMITED v. NEVILLE J.
 MANNING, WARDLE & CO., LIMITED.

[1908 M. 1729.]

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 Nov. 13.

*Company—Director holding Majority of Votes—Action in Name of Company—
 Majority of Co-directors opposing—Motion to strike out Name of Com-
 pany as Plaintiff—Costs—Companies Act, 1862 (25 & 26 Vict. c. 89),
 Sched. I., Table A, art. 55.*

The M. Company was incorporated under the Companies Acts and acquired and worked a patent. The powers of its directors were governed by art. 55 in Sched. I. to the Companies Act, 1862, which provides "the business of the company shall be managed by the directors, who may . . . exercise all such powers of the company as are not by the foregoing Act, or by these articles, required to be exercised by the company in general meeting, subject nevertheless to any regulations of these articles, to the provisions of the foregoing Act, and to such regulations, being not inconsistent with the aforesaid regulations or provisions, as may be prescribed by the company in general meeting." A. and three other persons were the four directors of the company and between them held substantially the whole of the subscribed share capital of the company. A. held a majority, but not a three-fourths majority, of the shares and votes. Disputes arose at the board between A. and the other three directors, who were interested in a patent vested in the N. Company, which, so A. was advised, infringed the M. Company's patent and was admittedly a competing patent. The three directors bona fide declining to sanction any proceedings against the N. Company, A. commenced an action against the N. Company in the name of the M. Company to restrain the alleged infringement. Thereupon the three directors moved

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in the name and on behalf of the M. Company to strike out the name of that company as plaintiff and to dismiss the action on the ground that the name of the M. Company had been used without authority :—

Held, on the construction of art. 55, that the majority of the shareholders had the right to control the action of the directors in the matter, and that the motion must be dismissed with costs as between solicitor and client to be paid by the solicitors who had launched it.

Automatic Self-Cleansing Filter Syndicate Co. v. Cuninghame, [1906] 2 Ch. 34, distinguished.

MOTION.

The plaintiff company was incorporated in 1904 with the object of acquiring and working certain patents, the property of one Marshall, for improvements in valve gear for locomotives and other engines, and the patents were duly assigned to and vested in the company. The capital of the company was 71,500*l.* divided into 71,500 shares of 1*l.* each. The consideration paid to Marshall for the assignment was a sum of 10,000*l.* in cash and the allotment and issue to him of 42,900 fully paid up shares of 1*l.* each in the company. The articles of association of the company were the regulations of Table A in Sched. I. to the Companies Act, 1862, with some modifications. By art. 18 the first directors of the company were Marshall and three persons named Charlesworth, Wardle, and Frith, and each of them was to retain such office during such period as he should hold the necessary qualification of a director, and during such period should not be subject to the retirement prescribed by arts. 58 and 59 of Table A; and (art. 21) the qualification of a director was the holding by him of shares of the company of the nominal value of 1000*l.* The powers of the directors were regulated by art. 55 of Table A, which provides: "The business of the company shall be managed by the directors, who may pay all expenses incurred in getting up and registering the company, and may exercise all such powers of the company as are not by the foregoing Act, or by these articles, required to be exercised by the company in general meeting, subject nevertheless to any regulations of these articles, to the provisions of the foregoing Act, and to such regulations, being not inconsistent with the aforesaid regulations or provisions, as may be prescribed by the company in general meeting"

Charlesworth, Wardle, and Frith between them held 28,000 shares, which they had subscribed and paid for in cash; so that the four directors held substantially the whole of the subscribed capital of the company, except a few shares held by some of the subscribers to the memorandum, and Marshall had a majority, but not a three-fourths majority, of votes. Marshall was the managing director of the company. The business of the company was carried on prosperously for some time until the directors (other than Marshall) became interested in another patent which was vested in the defendant company and was admittedly a rival and competing patent with the plaintiff company's patent, and was also, as Marshall was advised, an infringement of that patent. Under these circumstances matters came to a deadlock between Marshall and his colleagues at the board of the plaintiff company, his three colleagues declining to sanction any proceedings against the defendant company. Thereupon, in July, 1908, Marshall, acting through his solicitors, Messrs. Simpson, Thomas & Co., of Leeds, commenced this action in the name of the plaintiff company, claiming an injunction to restrain the defendant company from infringing the plaintiff company's patent and the usual consequential relief. On October 30 the directors of the plaintiff company at a board meeting, which Marshall did not attend, resolved that Marshall had brought the action in the name of the company without the consent or approval of the board, and that the company's solicitors be instructed to apply to the Court that the name of the company as plaintiff be struck out. On November 10 a petition to wind up the plaintiff company, which Marshall had presented on the ground that it was impossible to carry on the business of the company any longer in consequence of the deadlock between himself and his colleagues, was dismissed with costs. The three dissentient directors now moved, in the name and on behalf of the plaintiff company, that the name of the plaintiff company might be struck out as plaintiff in the action on the ground that it had been inserted without the authority of the company, and that the action might be dismissed with costs to be taxed as between solicitor and client and to be paid by Marshall and his solicitors, who were made the respondents to the motion.

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NEVILLE J. *Jenkins, K.C.*, and *Austen-Cartmell*, for the motion. The action
 1908 has been commenced without the authority of the directors, who
 MARSHALL'S have under the articles the management of the business of the
 VALVE GEAR company under their control. The majority of the board in the
 COMPANY, exercise of their discretion consider that this action should not
 LIMITED be continued in the name of the company. The principle
 v. of *Automatic Self-Cleansing Filter Syndicate Co. v. Cuning-*
 MANNING, *hame* (1) applies. A bare majority cannot control the directors
 WARDLE in their management of the affairs of the company. We ask
 & Co., that the name of the company may be struck out as plaintiff,
 LIMITED. that the action may be dismissed, and that the solicitors on the
 record may be ordered personally to pay all the costs as between
 solicitor and client.

Gore-Browne, K.C., and *Colefax*, for the respondents to the motion. This is not a frivolous action and is not contrary to the contract in the articles between the company and its directors. In *Automatic Self-Cleansing Filter Syndicate Co. v. Cuninghame* (1) an extraordinary resolution was required to control the powers of the directors, which distinguishes it from the present case. The Court will have regard to the wishes of the majority of the shareholders and might direct a general meeting of the company to be held to ascertain their wishes : *Pender v. Lushington* (2) ; *Duckett v. Gover* (3) ; *Harben v. Phillips*. (4) To call a meeting in the present case would be useless, because we hold the majority of shares and votes and wish the action to go on.

[*Jenkins, K.C.* I admit a meeting would be useless.]

No misconduct is alleged against the three directors, but their interests conflict with their duties, and it is impossible for them, however honest, to be unbiassed and independent in the exercise of their discretion. The patent is vested in the company, who is the only possible plaintiff under the circumstances, and the majority of the company are in favour of the action. We ask that the action be allowed to proceed.

Jenkins, K.C., in reply.

F. Buckley, for the defendant company.

(1) [1906] 2 Ch. 34.

(2) (1877) 6 Ch. D. 70.

(3) (1877) 6 Ch. D. 82.

(4) (1883) 23 Ch. D. 14.

NEVILLE J. The circumstances of this case raise, to some extent, a novel point. Putting the facts shortly they amount to this. A patentee sold his patents to a company formed for the purpose of taking them over at a price which included the allotment to him of fully-paid shares. The subscribed cash capital of the company was found by other persons, and substantially nobody is interested in the company except the four directors, who include, as managing director, the patentee, Mr. James Thompson Marshall. Under those circumstances it is not surprising to find that the articles of association provide for the assurance of the position both of the patentee and of the other persons interested as directors of the company, and of course, *prima facie*, this position cannot be altered except upon the passing of a special resolution by the company. The patentee was given shares which gave him the controlling vote in the company, but not such a control as would give him a three-fourths majority and enable him to procure the passing of special resolutions. Now three of the directors, the directors other than the patentee himself, after the inception of the company, took out, or became proprietors of, a patent for the construction of valves which are said to be similar to, or to serve a similar purpose to that of, the valves which form the subject-matter of Mr. Marshall's patent, and it is said that the patent belonging to the other three directors is an infringement of Mr. Marshall's patent. The company, of course, is the owner of Mr. Marshall's patent, and alone able to litigate for the protection of that patent. The three directors had, in what I will assume to be the exercise of their discretion, refused on behalf of the company to oppose the grant of the patent to themselves or to those from whom they acquired it, and they have refused to commence, or to allow to proceed so far as they can help it, any action for the purpose of establishing that the new patent is an infringement of the patent of the company. Now it is obvious that in the position in which they have placed themselves on this question their duty and their interests are in direct conflict. On the one hand it is their duty as directors to protect the interests of the original patent, which is the property of the company; on the other hand their personal interests are clearly to maintain the validity of the

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NEVILLE J. patent which belongs to them, and which it is alleged is an infringement. Mr. Marshall has commenced an action in the name of the company for the purpose of restraining an alleged infringement on the part of the owners of the new patent, and the other directors come to the Court and ask to have the writ in that action taken off the file on the ground that the action was commenced without the authority of the company. It is admitted that the calling of a meeting of shareholders to ascertain the wishes of the company would be useless because the position of the voting power is perfectly well understood. It is divided between the persons concerned, and undoubtedly the managing director, who has commenced this action, would have the majority of votes at a general meeting, and, therefore, if it is right that effect should be given to the wishes of the majority of the company in the present case, it is admitted that no object is to be gained by calling a meeting, because the result of that meeting is a foregone conclusion. Under those circumstances ought the Court to direct the removal of the writ? Prior to the decision in *Automatic Self-Cleansing Filter Syndicate Co. v. Cuninghame* (1) the matter, I think, would have presented little difficulty, because I think in several cases, and certainly in *Pender v. Lushington* (2) and *Duckett v. Gover* (3), the principle has been acted upon that in the absence of any contract to the contrary the majority of the shareholders in a company have the ultimate control of its affairs, and are entitled to decide whether or not an action in the name of the company shall proceed. I think that that principle was recognized also by the Court of Appeal in the case of *Harben v. Phillips* (4), and I take it that prior to the decision in the case of *Automatic Self-Cleansing Filter Syndicate Co. v. Cuninghame* (1) the law was established to the effect that the majority of the shareholders, in the absence of a contract to the contrary, had the ultimate control of the affairs of the company and could assert their rights in general meeting. Now the question arises whether the decision in the case of *Automatic Self-Cleansing Filter Syndicate Co. v. Cuninghame* (1) is a decision

(1) [1906] 2 Ch. 34.

(3) 6 Ch. D. 82.

(2) 6 Ch. D. 70.

(4) 23 Ch. D. 14.

to the contrary. To my mind it is quite clear that the decision NEVILLE J. itself in that case is not in the least inconsistent with any of the decisions that preceded it, because in the case of *Automatic Self-Cleansing Filter Syndicate Co. v. Cuninghame* (1) the terms of the articles were that the directors should have the entire management of the affairs of the company subject to regulations "not being inconsistent with these presents as may from time to time be made by extraordinary resolution." In that case the directors had before them the consideration of a proposed sale of the assets on certain terms. They considered that those terms were not beneficial to the company. The majority of the shareholders in general meeting came to a different conclusion and sought to control the management of the directors in conformity with the views of a bare majority, but the contract between the shareholders in that case had been to the direct effect that the management of the directors should not be controlled except upon the passing of an extraordinary resolution. Inasmuch as there was no extraordinary resolution in that case the Court, it seems to me, could have come to no other conclusion than that at which they did arrive. I think that the head-note quite accurately sets out the effect of the decision: "Held, upon the construction of the articles, that the directors could not be compelled to comply with the resolution." There are among the observations which fell from one or more of the learned judges who decided that case propositions which, if I understand them correctly, I think extend beyond any of the decisions in the former cases, and, if I may say so very respectfully, appear to me to be inconsistent with the law as it stood at the time when the case of *Automatic Self-Cleansing Filter Syndicate Co. v. Cuninghame* (1) was decided. Perhaps I have not correctly interpreted those observations. They are in any case dicta not binding upon me. I am, of course, bound by the decision at which the Court arrived, and which, as I said before, seems to me in complete conformity with the law as I understand it. If I am right in this conclusion, it is obvious, I think, that I ought not to interfere with the progress of the present action, because it is brought with the approval of the majority of the shareholders

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VALVE GEAR
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WARDLE
& CO.,
LIMITED.

(1) [1906] 2 Ch. 34.

NEVILLE J. in the company, and, upon the decisions which I have referred
1908 to, they are the persons who are entitled to say, aye or no,
MARSHALL'S whether the litigation shall proceed. In the present case
VALVE GEAR there is no difficulty about the articles of association, because
COMPANY, there is no unusual contract between the members of the com-
LIMITED pany with regard to the powers of the directors, although there
v. is with regard to the continuation of their office; but the powers
MANNING, of the directors are regulated by art. 55 and simply state the
WARDLE relation existing between the directors and the company as a
& Co., general body, and I think that under art. 55 the majority of
LIMITED. the shareholders in the company at a general meeting have a
right to control the action of the directors, so long as they do
not affect to control it in a direction contrary to any of the pro-
visions of the articles which bind the company. I think, there-
fore, the motion in the present case fails and must be dismissed
with costs.

Gore-Browne, K.C. Unless the solicitors who brought this motion say they are authorized to state that the directors are willing that the order should be made against them personally, I ask that an order for costs as between solicitor and client be made against the solicitors.

Austen-Cartmell. I do not know what authority there is for that.

Gore-Browne, K.C. It is the converse case to that where an action is brought in the name of a company wrongfully. There the solicitor who brings it has to bear the costs.

Austen-Cartmell. Because he acts without authority.

Gore-Browne, K.C. This is the converse case. We having brought this action rightly, somebody who does not for this purpose represent the company has set in motion the Court to say that we have brought the action wrongly. The directors are not nominally before the Court, and I ask that the order be against the solicitors.

Austen-Cartmell. The motion was properly brought in the name of the company, because a properly constituted board passed a resolution authorizing the motion to be brought. All that the Court has decided is that for the purposes of this action

the company's name is properly used. The majority of the NEVILLE J. board, in whose hands is the management of the company's 1908 affairs, are still capable of acting in the name of the company. They have done nothing wrong.

Gore-Browne, K.C. The directors, knowing that the majority of the company sanction the bringing of this action, are really acting in defiance of the wishes of the majority of the company, and have wrongly used the name of the company to do that which they know the company did not desire should be done.

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NEVILLE J. This is a motion in the action to stay the action, and I have held that the company is properly carrying it on. I think, therefore, that I must make the usual order against the country solicitors. I should hope that this is merely an academic question.

Austen-Cartmell. I do not suppose there will be any question of the professional gentlemen paying.

Solicitors: *Surr, Gribble & Co., for Nelson, Eddisons & Co., Leeds; Helder, Roberts & Co., for Simpson, Thomas & Co., Leeds.*

H. L. F.

NEVILLE J.

1908

Nov. 19.

In re BRUNNING.GAMMON *v.* DALE.

[1908 B. 2312.]

*Will—Annuity—Direction to purchase—Death of Annuitant before purchase—
Right of Annuitant's Administratrix to Capital Value of Annuity—
Interest.*

A testator bequeathed an annuity to his sister for life to commence from his decease and to be paid by equal quarterly payments, and directed his executors to provide for the annuity by purchasing a Government annuity. The testator died on September 21, 1907, and on December 20, 1907, his executors made the first quarterly payment of the annuity. The annuitant died on March 16, 1908, before the Government annuity had been purchased:—

Held, that her legal personal representative was entitled to such a sum as would have purchased the annuity on December 20, 1907—that being the date up to which the annuity had been paid—with interest on that sum from that date at the rate of 4 per cent. per annum.

ADJOURNED SUMMONS.

H. C. Brunning by his will dated September 6, 1904, appointed the plaintiffs executors of his will, and (amongst other annuities) bequeathed an annuity of 200*l.* to his sister Grace Brunning, and declared that each of the annuities should commence from his decease and be payable during the life of the annuitant by equal quarterly payments, the first of such payments to be made at the end of three calendar months after his decease, and the testator directed his executors to provide for the payment of the said annuities by purchasing the same in the names of the annuitants respectively from the Government and in no other manner; and the testator gave the residue of his estate to certain charities.

The testator died on September 21, 1907, and the plaintiffs duly proved his will. On December 20, 1907, the plaintiffs paid to Grace Brunning the sum of 50*l.* (less income tax) on account of her annuity, but did not purchase a Government annuity in her name in pursuance of the direction contained in the will, as

they were unable to ascertain from her any information as to NEVILLE J. her age.

On March 16, 1908, Grace Brunning died, aged sixty-four, and her administratrix claimed payment from the plaintiffs of the sum of 2167*l.* 6*s.*, being the sum that would at the testator's death have been required to purchase the annuity of 200*l.* The question raised by the summons was whether the plaintiffs ought to pay the administratrix of Grace Brunning the sum of 2167*l.* 6*s.* with interest thereon at 4 per cent. from the testator's death, less the 50*l.* paid on account, or any other and what sum with interest for any other and what period and at any other and what rate.

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DALF.

Adams, for the plaintiffs.

Peterson, K.C., and *Manning*, for the legal personal representative of the annuitant. There is no distinction in principle between a direction to invest a definite sum in the purchase of an annuity and a direction to purchase an annuity of a definite amount. The facts of this case are very similar to those in *In re Robbins* (1), where the Court of Appeal held that the legal personal representative of an annuitant, who died a few days after the testator, was entitled to the sum required to purchase the annuity at the death of the testator. The question of interest, however, was not raised in that case. It is submitted that the legal personal representative is entitled to the sum required to purchase the annuity on December 20, that being the date when the quarterly payment of the annuity was made, with interest from that date at 4 per cent.: *Dawson v. Hearn*. (2)

A. B. Marten, for the residuary legatees. The right of the legal personal representative to payment of the capital value of the annuity is not disputed, but it is pointed out in *In re Robbins* (3) that *Dawson v. Hearn* (2) is not a clear decision as to the date when the annuity is to be valued. The authorities shew that a bequest of money to purchase an annuity is a vested legacy from the death of the testator of that sum, and the annuitant may elect to take that sum or to have it laid out in an annuity.

(1) [1907] 2 Ch. 8.

(2) (1831) 1 Russ. & My. 606.

(3) [1907] 2 Ch. 8, 13.

NEVILLE J. As it is a vested legacy, the ordinary rule that legacies do not carry interest until after the expiration of twelve months from the testator's death should apply. In *Palmer v. Craufurd* (1) Sir Thomas Plumer, after pointing out that the annuitant cannot receive both the intermediate annuity and the legacy, says: "I think that it must be considered in the same manner as if he had elected to take the 3000*l.* in money. As he had a vested interest in this sum from the time of the testator's death, his legal personal representatives are entitled to it, together with the interest from the expiration of a year after that event, and they must deduct the amount of the payment made to the annuitant in his lifetime." Those observations apply directly to this case, and the decision in *In re Friend* (2) is much to the same effect. It is submitted, therefore, that the annuity should be valued at the testator's death, that interest does not commence to run until twelve months afterwards, and that the quarterly payment of 50*l.* should be brought into account and deducted.

Peterson, K.C., in reply.

NEVILLE J. In this case I follow the decision of the Court of Appeal in *In re Robbins* (3) and hold that the gift of the annuity must be regarded as a legacy of the definite sum which would have purchased the annuity, and that the legal personal representative of the annuitant is entitled to payment of that definite sum. In that case the annuitant died a few days after the death of the testator and the question of interest was not raised. In the present case the annuitant lived for some months after the testator and received one quarterly instalment of the annuity, and the question is whether her legal personal representative is entitled to any and what interest on the amount of the capital value of the annuity, and, if so, from what date the interest is to run. For this purpose it is necessary to determine the date at which the value of the annuity is to be computed, and in this connection it is material to observe that the testator directed payment of the annuity as from the date of his death and that the first quarterly payment of it was made three months after

(1) (1819) 3 Swans. 482, 488—9.

(2) (1898) 78 L. T. 222.

(3) [1907] 2 Ch. 8.

his death. Now it seems to me that the origin of the rule, that where money is bequeathed to be invested in the purchase of an annuity it must be regarded as a vested legacy from the death of the testator of the sum that will purchase the annuity, was the idea that it was a matter of indifference whether the annuitant had his annuity purchased for him or received in cash the sum that would purchase it, because, if the annuity was purchased for him, he could sell it the next day. If that is so, I think the result is that when an annuity has been paid for a time the annuitant has the right, which passes to his legal personal representative, to say "Give me the sum that will purchase the annuity from now onwards," and that he is entitled to be paid the sum that would purchase the annuity as at the date of the last payment to him. I also think that interest ought to run from that date, because as from that date he is entitled to payment of the amount required to purchase the annuity. I hold, therefore, that in this case the legal personal representative of the annuitant is entitled to the sum that would be required to purchase the annuity at the expiration of three months from the death of the testator, and that as from that date interest is payable on that sum at the rate of 4 per cent. per annum.

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Solicitors: *Parson, Lee & Co.; Dale & Co.; Travers-Smith & Braithwaite.*

H. L. F.

NEVILLE J.

1908

Nov. 25.

In re ROUTLEDGE'S TRUSTS.ROUTLEDGE *v.* SAUL.

[1908 R. 819.]

Settlement—Power to appoint new Trustees—Tenant for Life Donee of Power—Executors of last surviving Trustee acting as Trustees of Settlement—Appointment by Donee of new Trustees—Validity of Appointment—Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 30, sub-s. 1—Trustee Act, 1893 (56 & 57 Vict. c. 53), ss. 10, 25.

By a settlement real estate was in 1874 conveyed to A. and B. in fee upon trust that they and the survivor of them and the heirs and assigns of such survivor should hold the trust estate upon certain trusts under which C. was the first tenant for life; and by the same settlement a power to appoint new trustees was vested in C. and D. during their joint lives. B. survived A. and died in 1905, and the executors of his will acted as the trustees of the settlement. In 1908 C. and D. in exercise of the power by deed appointed two persons to be new trustees of the settlement and made the usual vesting declaration. The executors of B. objected that the appointment of new trustees was a nullity because they were, by virtue of s. 30 of the Conveyancing Act, 1881, the existing trustees of the settlement, and that, though willing to retire, they could not be displaced except by the Court or by a deed to which they were made parties and retired:—

Held that, although the executors were trustees of the settlement until the new trustees were appointed, the deed was a valid exercise of the power to appoint new trustees and operated forthwith to oust the executors for all purposes from the trust.

ADJOURNED SUMMONS.

By deed dated May 23, 1874, and made between William Routledge of the first part, the plaintiff Jean Routledge, the wife of the said William Routledge, of the second part, and R. H. Mounsey and Silas Saul (thereinafter described as “the said trustees”) of the third part (being a separation deed between the said William Routledge and Jean Routledge, his wife), freeholds, copyholds, and customary freeholds were conveyed unto the said trustees, their heirs and assigns, as to the freeholds to the use of the trustees, their heirs and assigns, and as to the copyholds and customary freeholds to the use of the said trustees,

their heirs and assigns, according to the custom of the manor NEVILLE J. under which they were respectively holden, subject to certain incumbrances, upon trust that the said trustees and the survivor of them and the heirs and assigns of such survivor should let and manage the premises, keep down the incumbrances, and pay the residue of the rents and profits to the plaintiff Jean Routledge during the joint lives of her husband and herself, and to the survivor of them during his or her life, and after the death of such survivor to stand possessed of the trust premises in trust for the children of the said William Routledge and Jean Routledge as therein mentioned. This deed contained the usual power for appointing new trustees, which was vested in William Routledge and Jean Routledge during their joint lives and in the survivor of them during his or her life. The trustees were not admitted to the copyholds, so that they had only an equitable estate in them.

Silas Saul survived his co-trustee and died in April, 1905, having by his will appointed the defendants Saul and Bernard his executors, who duly proved the same.

After the death of Silas Saul the defendants Saul and Bernard, as his executors, acted as trustees of the settlement and entered into possession of the trust estate and managed it, collected the rents, and from time to time paid the balance of them to Jean Routledge.

By deed dated March 6, 1908, William and Jean Routledge, in exercise of the power conferred on them by the settlement of May 23, 1874, appointed the defendants Rome and Pearson new trustees of the settlement in the place of R. H. Mounsey and Silas Saul; and the same deed contained the usual declaration vesting the trust property in the new trustees.

On March 18 the new trustees through their solicitor applied to the defendants Saul and Bernard to hand over all the trust title deeds and documents, but this the latter declined to do, alleging that they as executors of the late Silas Saul, having accepted the trust, were the trustees by virtue of s. 30, sub-s. 1, of the Conveyancing Act, 1881, and that the appointment of the new trustees was ultra vires. Jean Routledge thereupon issued this summons asking a declaration that the defendants Rome and

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LEDGE'S
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NEVILLE J. Pearson had been duly and validly appointed new trustees of the settlement, and that the defendants Saul and Bernard might be directed to transfer to such new trustees the muniments of title, &c., relating to the trust estate.

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TRUSTS,
In re.

ROUTLEDGE

v.
SAUL.

T. L. Wilkinson, for the plaintiffs. Admitting that the executors of Saul were trustees of the settlement until the deed appointing new trustees was executed, we say that the moment the new trustees were appointed the power of the executors to act as trustees of the settlement was determined. The executors may rely on *In re Morton and Hallett* (1) and *In re Waidanis* (2), but both of those cases are clearly distinguishable and we do not dispute them. In *In re Morton and Hallett* (1) no new trustees had been appointed and the customary heir of the last surviving trustee was acting as trustee. Then in *In re Waidanis* (2) the question was whether the executors of the last surviving trustee had been duly appointed trustees of a will. Here Mr. and Mrs. Routledge have the power to appoint new trustees, and it was not necessary to apply to the Court, because, as pointed out by s. 10 of the Trustee Act, 1893, they "are the persons nominated for the purpose of appointing new trustees by the instrument creating the trust." Therefore the defendant executors had no power under s. 10 to appoint, nor will the Court under s. 25 of the Act appoint new trustees where there are persons able and willing to appoint out of Court. Here the trust estate has been taken out of the executors by the exercise of the power and the vesting declaration. There is no case which decides that, where such a power has been duly exercised, the executors of the last surviving trustee nevertheless continue to be the trustees of the settlement.

Cann, for the defendant new trustees. The power to appoint new trustees is an overriding power and governs the whole settlement and has been validly exercised. No personal confidence has been placed by the settlors in the executors of the last surviving trustees—*In re Morton and Hallett* (3)—though it may have been necessary for the continuity of the trust estate for them to act until new trustees were appointed.

(1) (1880) 15 Ch. D. 143.

(2) [1908] 1 Ch. 123.

(3) 15 Ch. D. 146.

C. James, for the defendant executors of Saul. The right of NEVILLE J. the donees of the power to appoint new trustees is not disputed, 1908 but the question is whether the event has happened which ROUT- entitles them to appoint. It is submitted that when a surviving LEDGE'S trustee dies there is no vacancy in the trusteeship if his heir or TRUSTS, executor accepts the trusts and is willing to act: *In re Morton* In re. ROUTLEDGE and *Hallett*. (1) That is what happened here. The executors of R. SAUL. Saul are by virtue of s. 30 of the Conveyancing Act, 1881, "his heirs and assigns," and having accepted and acted in the trusts they are and remain the trustees of the settlement until new trustees are properly appointed with their consent. They are willing to retire, but it must be by a deed to which they are made parties and retire, or by the Court appointing new trustees. The deed of March, 1908, is not a valid exercise of the power, which was never intended to confer the right to remove trustees, but that is what the donees are purporting to do by this deed. Suppose the executors had continued to act as trustees for twenty years, could it be said that the donees of the power had the right to remove them from their trusteeship by merely executing a deed in this way?

NEVILLE J. In this case a settlement was executed in 1874, which was a separation deed between a husband and his wife, and by the settlement property was conveyed to two persons upon trust that they and the survivor of them and the heirs and assigns of such survivor should hold the property on certain trusts under which the wife was the first tenant for life; and by the same settlement a power of appointing new trustees was given to the husband and wife during their joint lives. Now it has been held that on the death of a sole surviving trustee of a settlement his legal personal representatives are competent to execute the trusts if willing to act. But it is said that, if the legal personal representatives accept the trusts and act, the power to appoint new trustees becomes a nullity, and that the donee of the power cannot exercise it, because he is confronted by the fact that there are existing trustees. It seems to me, however, that there is a fallacy underlying that argument. It is of course

NEVILLE J. true that by virtue of sub-s. 1 of s. 30 of the Conveyancing and
 1908 Law of Property Act, 1881, trust property vests, on the death of
 ROUT- a sole surviving trustee, in his legal personal representatives, but
 LEDGE'S the right of the legal personal representatives to act as trustees
 TRUSTS, does not, I think, interfere with the right of the donee of a power
In re. to appoint new trustees to exercise that power; and, in my
 ROUTLEDGE opinion, directly that power is exercised the legal personal repre-
 v. sentatives of the last surviving trustee are displaced by the
 SAUL. appointment and ousted for all purposes from the trust. I hold,
 — therefore, in the present case that the new trustees appointed
 under the deed of March 6, 1908, are well appointed and are the
 sole trustees of the settlement of 1874, and the executors of Silas
 Saul must hand over to them the muniments of title and account
 for any moneys they have received. The costs of all parties to
 this application will come out of the estate.

Solicitors: *Peet & Manduell, for J. Hetherington, Wigton;*
Speechly, Mumford & Co., for Saul & Co., Carlisle.

H. L. F.

PARKER J.

STARKEY v. BARTON.

1908

[1908 S. 1607.]

Dec. 10, 11. *Landlord and Tenant—Option to purchase Landlord's Interest—Condition*
Precedent—Rent "in the meantime" to have been "duly" paid—Part of
Purchase-money to be left on Mortgage—Specific Performance.

Defendant, the lessee of a house, let the house to plaintiff at a rent payable quarterly in advance. The tenancy agreement gave plaintiff an option to purchase defendant's interest in the house on the plaintiff giving defendant notice in writing of the intention to purchase, provided plaintiff should "in the meantime have duly paid the said rent hereby reserved." The plaintiff did not pay the rent due on December 25, 1907, until January 10, 1908. On March 20, 1908, the plaintiff gave notice of her intention to purchase:—

Held, that "duly" did not mean punctually, and that the condition precedent to the exercise of the option had been fulfilled.

Held, also, that the fact that the agreement provided that part of the purchase-money should be left on mortgage did not make the agreement an agreement for a loan, and that specific performance of the agreement must be ordered.

At the date of the agreement below stated Mrs. Georgina Barton was entitled to a house, 57, Gloucester Road, Regent's

Park, London, for a term then having about thirty-six years to run, at an annual ground rent of 9*l*.

By an agreement in writing dated July 25, 1907, and made between Mrs. Barton (therein called "the landlady") of the one part and Miss Ada Emma Louisa Starkey (therein called "the tenant") of the other part, the landlady agreed to let the house and the tenant agreed to take it for three years commencing from June 24, 1907, at a yearly rent of 60*l*., the first half-year's rent to be paid in advance on the execution of the agreement, and the rent thereafter to be paid quarterly in advance on the usual quarter days, and the tenant agreed to pay the rent on the days and times and in manner aforesaid without any deductions whatsoever except landlord's property tax; to pay the rates and taxes; to keep the demised premises in good order and condition; not to assign, demise, or otherwise part with the possession of the premises without the landlady's consent in writing; not to do anything which would be a nuisance or annoyance to the adjoining tenants, or which was prohibited by the lease; and not to use the premises otherwise than as a private residence without the landlady's consent in writing. The agreement also gave power to the landlady at all reasonable hours to enter upon and inspect the premises, and a power of re-entry in case the rent should be in arrear for twenty-one days or in case the tenant should not well and truly perform all the covenants and agreements on her part therein contained.

One clause of the agreement was as follows:—

"And lastly it is agreed that if the tenant shall at any time during this tenancy give to the landlady three months' notice in writing to expire before the expiration of this tenancy of her intention to purchase the leasehold reversion to the said premises now vested in the landlady, and provided she shall in the meantime have duly paid the said rent hereby reserved and faithfully performed and observed the agreement and conditions herein contained and on her part to be performed and observed, she shall be entitled to an assignment of the same upon payment of the sum of 585*l*. upon the terms and conditions hereinafter contained, viz. . . . On or before the expiration of the said notice the tenant shall pay to the landlady the sum of 100*l*. in part

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—

PARKER J. payment of the purchase-money and shall execute and deliver
1908 to the landlady a proper mortgage to secure the repayment of
STARKEY the sum of 485*l.*, the balance thereof (or such part thereof as
v. shall remain unpaid) by equal half-yearly payments of 50*l.* each
BARTON. with interest at the rate of 5*l.* per cent. per annum on the amount
— for the time being unpaid and one final payment of 35*l.* (or such
part thereof as shall remain unpaid) with interest as aforesaid
from the date of the expiration of the said notice.”

The mortgage was to contain the usual mortgage covenants with a proviso that on default in payment of any instalment for thirty days the whole amount remaining unpaid should immediately become due and owing, together with an attornment clause and a clause restricting the mortgagor's right to lease the premises without the mortgagee's previous consent in writing. The agreement also provided that if the notice should expire before the termination of the first year of the tenancy the tenant should be entitled to deduct from the 100*l.* all sums paid by her for rent in respect of the first year of the tenancy.

On July 25, 1907, the tenant paid 30*l.*, the first half-year's rent to December 25, 1907, and entered into possession of the house, and on January 10, 1908, she paid 15*l.*, the quarter's rent to Lady Day, 1908. For both these sums she held the landlady's receipts.

On March 20, 1908, the solicitor of the tenant, on her behalf, wrote to the landlady as follows: “I have been instructed by Miss Ada Emma Louisa Starkey, who is your tenant at 57, Gloucester Road, Regent's Park, to write exercising the option to purchase that house conferred on her by an agreement made between you and dated July 25, 1907. Pursuant to paragraph 3 thereof I enclose you my cheque for 53*l.* 13*s.* 9*d.* made up of 15*l.* rent in advance from Lady Day next to Midsummer (after deducting property tax 1*l.* 6*s.* 3*d.* receipt herewith) together with 40*l.* to complete the 100*l.* payable on the exercise of the option contained in the tenancy agreement. You will recollect you gave credit for the first year's rent upon exercise of the option within that period.” The writer also asked for the landlady's solicitor's name and address in order to get the matter settled.

In the course of the correspondence which ensued the exercise of the option to purchase was not admitted.

The tenant accordingly brought an action against the landlady, claiming (1.) a declaration that, upon the true construction of the agreement and in the events which had happened, the option had been duly exercised by the letter of March 20, 1908, and that at the expiration of three months from the date thereof the plaintiff would be entitled to an assignment upon the terms and conditions of the agreement, (2.) consequential relief, including, if necessary, an injunction to restrain the defendant from dealing with the property in breach of her obligations under the agreement and letter, and specific performance of the agreement alleged to be constituted by the two documents.

The defendant by her defence refused to admit that the option had been exercised, alleged that the rent had not been duly paid, and submitted that the contract, if any, was not one which in law was capable of being enforced by specific performance.

The action was tried on December 10, 1908.

A. Grant, K.C., and *A. Andrewes-Uthwatt*, for the plaintiff. The plaintiff had not made any default in payment of rent up to the time when she exercised the option. The fact that the rent due on December 25 was not paid until January 10 is immaterial. Where there is a covenant to renew a lease in case the covenants on the lessee's part in the old lease "shall have been duly observed and performed," the words are satisfied if the covenants have been so observed and performed that there is no existing right of action under them at the time when the lease is applied for: per Mellish L.J. in *Finch v. Underwood*. (1) According to Kay J. there was in that case a performance in "popular language" of the covenant: *Bastin v. Bidwell*. (2) In the present case the option has been properly exercised.

The plaintiff is asking the Court to order specific performance, not of a contract to lend money on mortgage, but of a contract to assign a lease on certain terms.

Romer, K.C., and *Wurtzburg*, for the defendant. Conditions imposed on the exercise of an option are strictly construed,

(1) (1876) 2 Ch. D. 310, 316.

(2) (1881) 18 Ch. D. 238, 252.

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—

PARKER J. and if they are conditions precedent they must be complied with by the time fixed, or the option is lost: Dart on Vendors and Purchasers, 7th ed. p. 272; *Dibbins v. Dibbins*. (1) The fact that the payment of money on a certain day is the condition precedent does not take the case out of the general rule that the option is lost if the condition is not performed: *Davis v. Thomas* (2); *Joy v. Birch* (3); *Brooke v. Garrod* (4); *Weston v. Collins* (5); *Lord Ranelagh v. Melton*. (6) The plaintiff in the present action did not pay the rent in advance on December 25, 1907, and by this default she has lost her right to exercise the option. In *Finch v. Underwood* (7) and *Bastin v. Bidwell* (8) the words of the document were different from those of the agreement in this case, and, moreover, the observations of Mellish L.J. in the former case only amount to a dictum.

In the present case the words "in the meantime" have no force unless the clause is construed, as the words have been construed, as requiring strict observance of every covenant throughout the period prior to the exercise of the option: *Leeds and Hanley Theatre of Varieties v. Broadbent*. (9)

[PARKER J. referred to *Benabo v. James*. (10)]

As the agreement involves the execution of a mortgage the Court will not order it to be specifically performed: *South African Territories, Ltd. v. Wallington*. (11)

A. Grant, K.C., in reply.

Cur. adv. vult.

Dec. 11. PARKER J. (after referring to the agreement and lastly to the words under which the plaintiff claimed an option to purchase). I am of opinion that the conditions lastly referred to are not conditions precedent to the right to exercise the option, but are terms of the contract resulting from its exercise. The only conditions precedent are, in my mind, first, the giving of proper notice, and, secondly, the proviso as to

(1) [1896] 2 Ch. 348.

(2) (1830) 1 Russ. & My. 506.

(3) (1836) 4 Cl. & F. 57, 89.

(4) (1857) 2 De G. & J. 62.

(5) (1865) 34 L. J. (Ch.) 353.

(6) (1864) 2 Dr. & Sm. 278.

(7) 2 Ch. D. 310, 316.

(8) 18 Ch. D. 238, 252.

(9) [1898] 1 Ch. 343, 349.

(10) (1900) 109 L. T. Journ. 408.

(11) [1898] A. C. 309.

payment of rent and the performance and observance of agreements and conditions. It is admitted that a proper notice of the exercising of the option was given on March 20, 1908, but it is alleged that the second condition precedent was not fulfilled because the plaintiff did not pay the quarter's rent which became due on December 25, 1907, until January 10, 1908.

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The law is quite clear that where there is a condition precedent to the exercise of an option of this sort the condition must be strictly fulfilled, but, on the other hand, there are no special rules of construction by which clauses creating conditions precedent are to be interpreted.

In the present case the person who exercises the option must, when it is exercised, be in a position to say, and to say truly, "I have, since the commencement of my tenancy and up to the present time"—which I take to be the meaning of the expression "in the meantime"—"duly paid, according to the meaning of the clause conferring the option, the rent reserved by the tenancy agreement." The question is, Could the plaintiff say this, and say it truly, on March 20, 1908? If "due payment" means punctual payment, she certainly could not, because one payment of rent had been allowed to fall for a few days into arrear. On the other hand, all rent due up to the date at which the option was exercised had in fact been paid, and it had been duly paid in the sense that the payment made discharged the legal obligation and would have been a complete defence to an action for rent or on a covenant for payment of rent, and also, apart from any question of waiver, to an action to enforce the proviso for re-entry. That "duly" need not necessarily mean punctually is, I think, clear from the decision of Farwell J. in *Benabo v. James* (1) to which I have referred. In that case there was a covenant not to call in a mortgage on leasehold hereditaments if the ground rent was duly paid. There were special circumstances in the case, but it was held that if the ground rent was paid in time to prevent the exercise of the right of the lessor to re-enter, that was due payment within the meaning of the covenant.

In *Finch v. Underwood* (2) it was held that at the expiration of a lease the lessee might truly say that she had performed and

(1) 109 L. T. Journ. 408.

(2) 2 Ch. D. 310, 316.

PARKER J. observed the covenants of the lease, although she had not in fact observed them, but had broken them, although she subsequently remedied the breaches.

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In *Bastin v. Bidwell* (1) Kay J. pointed out that "due performance" meant performance in the popular rather than in the legal sense of the expression. The covenantor had not performed his legal obligation, but had merely remedied its breach.

I am of opinion that on the true construction of the clause creating the condition precedent in the present case "duly" does not mean punctually, and I think that, within the meaning of the clause, the plaintiff could truly say on March 20, 1908, that she had since the commencement of her tenancy duly paid the rent reserved by the tenancy agreement. I hold, therefore, that all the conditions precedent to the exercise of the option were in fact performed.

The only other answer given to the plaintiff's claim is that the contract is a contract one term of which involves a loan, and that the Court never grants specific performance of an agreement for a loan. The contract in the present case is not, however, in any true sense a contract for a loan, but is in substance and in fact a contract for sale and purchase of land, part of the purchase-money being left upon mortgage. I can see no reason, either theoretically or practically, why the Court should not grant specific performance of such an agreement.

There will be a declaration that, upon the true construction of the memorandum of agreement, the option was duly exercised by the letter of March 20, 1908, and an order for specific performance of the agreement constituted by the memorandum and the letter. The form of mortgage can be settled in chambers in case the parties differ, and the defendant must pay the costs of the action.

Solicitor for plaintiff: *Frank Daphne*.

Solicitors for defendant: *A. Savage Cooper & Everett*.

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ASSURANCE ASSOCIATION.

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Nov. 16, 17.

[1908 W. 1165.]

*Consideration — Antecedent Debt — Security — Policy of Assurance — Interests
based on Valuable Consideration.*

The mere existence of an antecedent debt is not valuable consideration for a security given by the debtor.

H. was entitled to a policy of assurance for 5000*l.* on his own life subject to conditions which made the policy void “if the lives assured died by their own hands . . . but without prejudice to the bona fide interests of third parties based on valuable consideration.” He was indebted to W. in sums exceeding 15,000*l.* W. had pressed for payment or reduction of the debt. H. executed a deed of assignment of the policy to W. by way of mortgage to secure all moneys owing to him from H., and delivered the deed duly executed to his solicitors, telling them to use their own discretion whether they should inform W. of the assignment or not. The solicitors obtained time from W. for payment of the debt without producing the deed, and, acting on H.’s instructions, destroyed it. H. shortly afterwards died by his own hand. No notice of the existence of the assignment was given to W. or the insurance society during H.’s life. After his death his estate was being administered in Court, and the fact of the assignment was discovered and communicated to W.’s firm, who had taken in a claim. Notice of the assignment was then given to the insurance society, and the executors of W., who had died, brought this action to recover the policy moneys:—

Held, that there was no valuable consideration for the assignment within the saving clause in the policy, and the action therefore failed.

On December 18, 1902, William Henry Hackblock effected a policy on his own life with the English and Scottish Law Life Assurance Association for 5000*l.*, subject to conditions printed on the policy, of which No. 6 contained the following provision: “Policies will also be void and all premiums forfeited if the lives assured die by their own hands, or by duelling, or by the hands of justice, but without prejudice to the bona fide interests of third parties based on valuable consideration.”

In August, 1906, Hackblock was being pressed by Sir Frederick Wigan for payment or reduction of a debt of 15,000*l.* and upwards, and on August 30, 1906, Hackblock wrote to his solicitors, in a letter enclosing the policy, “I enclose a 5000*l.* policy Get it

PARKER J. assigned to Wigan or to yourselves Please get this done at once
1908 When I pay off I can get it re-assigned to me Wigan need
WIGAN not know of the policy till it is repaid." Hackblock's solicitors,
v. on receipt of this letter, prepared and sent him for execution a
ENGLISH deed expressed to be made between himself, therein called the
AND mortgagor, and Sir Frederick Wigan, therein called the mort-
SCOTTISH gagee, by which, after a recital that the mortgagor was indebted
LAW LIFE to the mortgagee in sums amounting to upwards of 15,000*l.* and
ASSURANCE that the mortgagee had asked for further security, the policy was
ASSOCIATION. assigned to the mortgagee with a proviso for redemption on pay-
ment of all moneys due from the mortgagor to the mortgagee
with interest. It was not true that Sir Frederick Wigan had
asked for further security, but he or his firm had pressed for
reduction of the debt.

Hackblock duly executed this mortgage and sent it to his solicitors with a letter, leaving it entirely to them to decide whether they should tell Sir Frederick Wigan of the deed or not. The solicitors negotiated an arrangement with Sir Frederick Wigan's firm for giving Hackblock time, without producing the assignment of the policy, and they shortly afterwards, at Hackblock's request, destroyed the assignment. No notice of the assignment was given to the insurance society or to Sir Frederick Wigan or his firm during Hackblock's life.

Hackblock died by his own hand on September 19, 1906.

Sir Frederick Wigan died on April 6, 1907, having made a will appointing the plaintiffs his executors, and they had obtained probate.

Hackblock's estate was being administered in the Chancery Division. Sir Frederick Wigan's firm had brought in a claim, and the facts as to the assignment having come to the knowledge of the Master, he caused the plaintiffs to be informed of them. The plaintiffs then gave notice to the assurance association of the assignment and brought this action against them for payment of the moneys insured.

Upjohn, K.C., and *Gatey*, for the plaintiffs. The first contention of the defendants will be that the deed assigning the policy was delivered as an escrow only; but the question

whether a deed is so delivered depends on the circumstances attending its execution: *Murray v. Earl of Stair* (1); *Bowker v. Burdekin*. (2) Subsequent circumstances, such as that the person executing the deed directs a third person to keep it till a certain event, or to keep it in his own possession, are immaterial: *Doe v. Bennett* (3); *Doe v. Knight*. (4) Delivery may be affected by the conduct of the party: Norton on Deeds, p. 11; and the conduct of Hackblock at the time when he executed the deed shews plainly that he intended to deliver it as a document presently binding on himself.

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The second defence is that there was no valuable consideration for the assignment; but an assignment to a creditor to whom a debt is undoubtedly due in payment of or as security for that debt is an assignment for valuable consideration: see the judgments of Jessel M.R. in *Middleton v. Pollock* (5) and Vaughan Williams J. in *Davies v. R. Bolton & Co.* (6) The last-named decision covers the present case. The same proposition must have been assumed in *New, Prance, and Garrard's Trustee v. Hunting* (7), for the whole of the elaborate argument in that case as to whether the deed in question was a fraudulent preference was useless and irrelevant except on the assumption that the debts in respect of which the assignment was made constituted a valuable consideration. If they did not, the deed could at once have been set aside on that ground.

[*Romer, K.C.*, referred to *Cracknall v. Janson* (8) and *In re Barker's Estate*. (9)]

Neither of those decisions has any bearing on the present case. Both turned on the question whether the deeds were fraudulent and void under 27 Eliz. c. 4. The assignment in the present case was bona fide and for valuable consideration, and the plaintiffs are entitled to succeed. [They also referred to *In re Ridler* (10) and *Exton v. Scott*. (11)]

(1) (1823) 2 B. & C. 82.

(2) (1843) 11 M. & W. 128.

(3) (1837) 8 C. & P. 124.

(4) (1826) 8 Dow & Ry. 348.

(5) (1876) 2 Ch. D. 104, 108.

(6) [1894] 3 Ch. 678, 688.

(7) [1897] 2 Q. B. 19; on appeal
sub nom. *Sharp v. Jackson*, [1899]
A. C. 419.

(8) (1879) 11 Ch. D. 1.

(9) (1875) 44 L. J. (Ch.) 487,

(10) (1882) 22 Ch. D. 74.

(11) (1833) 6 Sim. 31.

PARKER J. *Romer, K.C., and Maugham*, for the defendants. To constitute valuable consideration for giving a security there must either be an agreement by the creditor to give time—*In re Barker's Estate* (1)—or time actually given from which such an agreement can be inferred, or the creditor must forbear to enforce payment in consequence of the agreement to give security: *Alliance Bank v. Broom* (2), approved in *Fullerton v. Provincial Bank of Ireland*. (3) The fact that the security was not communicated may not in itself preclude the validity of the deed, but it is important in two ways—(1.) if there is no communication it cannot be argued that the case belongs to the class in which, though the deed was originally voluntary, the creditor has altered his position on account of it, and so consideration was imported, and (2.) the absence of communication prevents the Court from inferring from the subsequent conduct of the creditor that there was a contract to give time. The cases cited for the plaintiffs cannot establish the proposition that the mere existence of a debt is valuable consideration for a security. That is contrary to the rule established by all the other authorities and laid down in all the text-books, e.g., Anson on Contracts, 11th ed. p. 88.

In *Middleton v. Pollock* (4) the money had been given to the solicitor to invest and he had agreed to invest it; the security could not be a voluntary one in face of that agreement. The question was only whether it was good under 13 Eliz. c. 5. In *Davies v. R. Bolton & Co.* (5) the question was as to the validity of a debenture, and the words of Vaughan Williams J. relied on by the plaintiffs were at most a dictum, and there was consideration apart from the issue of the debt. In *New, Prance, and Garrard's Trustee v. Hunting* (6) the point was neither argued nor decided.

Gatey, in reply. The interest of the plaintiffs is clearly based on valuable consideration within the meaning of the condition of the policy.

(1) 44 L. J. (Ch.) 487.

(2) (1864) 2 Dr. & Sm. 289.

(3) [1903] A. C. 309, 311, 313.

(4) 2 Ch. D. 104, 108.

(5) [1894] 3 Ch. 678, 688.

(6) [1897] 2 Q. B. 19; on appeal sub nom. *Sharp v. Jackson*, [1899] A. C. 419.

PARKER J. In this action the plaintiffs, who are the executors of the late Sir Frederick Wigan, sue on a policy of insurance on the life of the late Mr. William Henry Hackblock, of which they claim to be the assignees. PARKER J.

The policy contains a provision to this effect: "Policies will also be void"—which, of course, includes this policy—"and all premiums forfeited, if the lives assured die by their own hands, or by duelling, or by the hands of justice, but without prejudice to the bona fide interests of third parties based on valuable consideration." It is admitted in this case that the insured, William Henry Hackblock, did die by his own hand, and, therefore, if the plaintiffs are to succeed in suing on the policy as a valid policy, they must bring themselves within the clause "without prejudice to the bona fide interests of third parties based on valuable consideration." In my opinion it is reasonably clear what that clause means, and I do not think that any particular point can be made as to the words which are actually used. The intention is that a person who is to be saved by the saving clause must be a person who is a purchaser of the interest he claims for value and has acquired that interest bona fide.

The question is, therefore, first, whether the plaintiffs are assigns of the policy as they claim to be; and, secondly, whether, if they are assigns of the policy, the interest they claim under the assignment is an interest which they acquired bona fide for valuable consideration.

The facts of the case are quite short. It appears that the insured had the misfortune to kill his wife by an accident, and on the day of her funeral he was evidently worrying as to various financial matters, and, among other things, as to a large sum of money which he owed Sir Frederick Wigan, a sum amounting to at least 15,000*l.*, and, as I gather, possibly a further sum of a considerable amount. He had given Sir Frederick Wigan some security, though it does not appear exactly what security, for that debt. On August 30, 1906, the day of his wife's funeral, he wrote to his solicitors, in effect telling them to prepare an assignment of this policy of insurance, which he enclosed in the letter, to Sir Frederick Wigan, or to themselves in trust for Sir Frederick Wigan, to secure Sir Frederick Wigan's debt. I think it is quite

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PARKER J. clear that that letter was received by Mr. Lightly, a member of
1908 the firm who were then acting for the insured, and that he on
WIGAN those instructions did prepare a draft assignment. The draft
v. assignment was identified by him and I have it in my hands. It
ENGLISH was originally dictated to a shorthand clerk, who copied it out,
AND and Mr. Lightly revised it in his own handwriting. It purports
SCOTTISH to be the draft of an indenture executed between the insured,
LAW LIFE William Henry Hackblock, therein called the mortgagor, and Sir
ASSURANCE Frederick William Wigan, therein called the mortgagee. It
ASSOCIATION. contains a recital that "the mortgagor is indebted to the mort-
gagor in sums amounting to upwards of 15,000*l.*, and the mort-
gagee has requested the mortgagor to give to him further security
for the repayment thereof." That recital is not true. There
had been no question as to further security, though possibly
there had been some question as to payment of the debt.
Then it is witnessed "That in pursuance of the said agreement
and in consideration of the premises, the mortgagor, as beneficial
owner," conveys the policy to the mortgagee, subject to a
proviso for redemption on payment of the moneys to the
mortgagee. That document having been prepared was engrossed,
and the engrossment was forwarded on August 31, 1906, to the
insured, William Henry Hackblock. He returned it executed and
attested in a letter of September 1, and I see no reason to doubt
that the engrossment so forwarded to him was actually executed
by him in the usual way. A question may arise as to whether
it was executed upon some condition which may or may not have
taken effect, but that question I postpone for the present.

The solicitors, having got this assignment to Sir Frederick Wigan in their possession, entered into negotiation with Sir Frederick Wigan's firm with a view to obtaining further time for the payment of the money which was due to Sir Frederick Wigan or his firm from the insured, and the gentleman who attended to the matter had the assignment in his pocket, at the time of the negotiation, to be used if it were necessary. It was not necessary, and it was not used, and it remained for some days afterwards in the hands of the solicitors for the insured, and on September 13 the gentleman who had charge of the matter destroyed the document upon the express instructions of the insured, and he

entered a note on the back of the draft to the effect that the original had been so destroyed by the instructions of the insured, and nothing further was done in the matter. PARKER J.
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The insured some days afterwards died by his own hand, and his estate, as I understand it, is being administered in this Division of the Court. In the process of that administration Sir Frederick Wigan's firm put in a proof, and in the course of investigating the claims of creditors the facts which I have just detailed came to the notice of the Master, and he directed that notice of them should be given to the firm. Notice of these facts was accordingly given, and the plaintiffs the executors of Sir Frederick Wigan claim to be assignees of the policy under this deed which was destroyed, and of which they subsequently gave notice to the insurance society. WIGAN
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Two points arise. The first is whether this document was executed and delivered as a deed to be binding, or whether it was executed and delivered upon a condition which would make it an escrow, in which case it would not operate until that condition was fulfilled. The second question is whether under the circumstances Sir Frederick Wigan, the mortgagee, can be said to have acquired his interest under the deed, if it did operate, bona fide for valuable consideration within the meaning of the clause in the policy to which I have referred. It is admitted by all parties that no communication was made to Sir Frederick Wigan or to any one on his behalf of the contents of the document until after the death of Mr. Hackblock and until in the course of the administration of the estate the Master directed that the facts which had come to his knowledge should be communicated.

Dealing first with the second question, I am of opinion that there is no possible ground for maintaining under the circumstances to which I have referred that Sir Frederick Wigan, the mortgagee, gave any consideration at all for the interest which he had acquired, if he did acquire any interest, under the deed in question. It appears to me to be reasonably clear that the mere existence of a debt from A. to B. is not sufficient valuable consideration for the giving of a security from A. to B. to secure that debt. If such a security is given, it may of course be given upon some express agreement to give time for the payment of

PARKER J. the debt, or to give consideration for the security in some other way, or, if there be no express agreement, the law may very readily imply an agreement to give time. It may not be a definite time, but to forbear for some indefinite time in consideration of the security being given. And further than that, if there is no express agreement, and no agreement can be implied at the time and under the circumstances at and under which the indenture giving the further security is executed, yet if that security be communicated to a person who could otherwise sue on the debt, and on the strength of that security he does in fact forbear to sue on the debt, he does give that time with the object of securing which the security is presumably given, and then I think it appears on the cases that there is sufficient consideration, though in a sense it is an *ex post facto* consideration, for the security which is given.

On the other hand, it appears to me that where there is no communication of the security, where there is no express agreement, and there are no circumstances from which the Courts can imply any agreement, then there is no possibility of its being said with any justice that any consideration has been given at all.

That that is the state of the law upon this particular point is, I think, reasonably clear from the authorities which have been quoted to me in argument, beginning with the case of *Alliance Bank v. Broom*. (1) In that case a customer had been called on by his bankers to give security for money due from him on a loan account, and had agreed by letter to give security. A bill which had been filed to enforce such agreement was demurred to on the ground that the agreement to give the security was without consideration. It was held in that case that the forbearance of the bank to enforce payment of the existing debt in consequence of the agreement was a sufficient consideration to support it, and the demurrer was overruled.

Now that case would have been wholly unnecessary and the arguments would have been wholly improper if the mere existence of the debt without any forbearance to sue was a sufficient consideration for the security which had been agreed to be given. Kindersley V.-C. says (2): "It appears to me, that

(1) 2 Dr. & Sm. 289.

(2) 2 Dr. & Sm. 292.

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when the plaintiffs demanded payment of their debt, and, in consequence of that application, the defendant agreed to give certain security, although there was no promise on the part of the plaintiffs to abstain for any certain time from suing for the debt, the effect was, that the plaintiffs did, in effect, give, and the defendant received, the benefit of some degree of forbearance; not, indeed, for any definite time, but, at all events, some extent of forbearance. If, on the application for security being made, the defendant had refused to give any security at all, the consequence certainly would have been that the creditor would have demanded payment of the debt, and have taken steps to enforce it. It is very true that, at any time after the promise, the creditor might have insisted on payment of his debt, and have brought an action; but the circumstances necessarily involve the benefit to the debtor of a certain amount of forbearance, which he would not have derived if he had not made the agreement." And that judgment of Kindersley V.-C. was approved by the House of Lords in the case of *Fullerton v. Provincial Bank of Ireland*. (1) There Lord Macnaghten, on the point which had been raised, says it was settled by authority. "In such a case as this it is not necessary that there should be an arrangement for forbearance for any definite or particular time. It is quite enough if you can infer from the surrounding circumstances that there was an implied request for forbearance for a time, and that forbearance for a reasonable time was in fact extended to the person who asked for it." And the other Lords used language very much to the same effect.

There is also a case of *Cracknall v. Janson* (2), in which Mr. Justice (afterwards Lord Justice) Fry deals with the law upon the subject in the same way. Lastly, there is the case of *In re Barker's Estate* (3), in which Sir George Jessel also deals with the subject. In that case the circumstances were to a considerable extent analogous to the circumstances in this case, and therefore I will deal with it in somewhat greater detail than I have done with the other cases. A solicitor had mortgaged an estate to the trustee of his marriage settlement, and, notwithstanding

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(1) [1903] A. C. 309, 313.

(2) 11 Ch. D. 1.

(3) 44 L. J. (Ch.) 487.

PARKER J. that, he fraudulently deposited the title deeds with another creditor of his own, fraudulently because the title deeds were in his possession as solicitor for the mortgagees, and he had no business or right to deal with them. Then in 1860 he mortgaged certain other lands which belonged to himself by way of demise, in order to secure the persons wronged from injury by reason of his having disposed of the title deeds of the estate which had been mortgaged. There was no consideration stated in the deed, and he retained the deed without making any communication at all to the persons in whose favour it was executed. The decision of Sir George Jessel was that that deed, not having been communicated, and there having been no forbearance, was an entirely voluntary deed, and, being a voluntary deed, was void as against a subsequent purchaser for value.

Sir George Jessel says this (1): "This being so, if the deed of the 24th of November, 1860, be voluntary, the statute of the 27th of Elizabeth avoids it by relation, the doctrine being that, however honest, as this was—for, in truth, it was an attempt to repair the consequences of a dishonest act by the person who had committed it—yet, in contemplation of law, the person who has executed the voluntary deed, and at any time after, conveys away the estate, although he gives notice to the purchaser of the voluntary deed, is presumed to have had in his mind, at the time of executing the voluntary deed, a fraudulent intent, that is, an intent to cheat the purchaser who bought the estate afterwards, with notice of the voluntary deed, and of the whole of the transaction. That is the law, and I must follow it. Consequently, as there is no consideration, the deed is a void deed." Then he proceeds to deal with the question of constructive notice as to whether there had been notice of the deed given to the person in whose favour it had been executed. Then he proceeds—and this is perhaps the most material part of the judgment—on the supposition that the person in whose favour the deed had been executed had had constructive notice, to state what would have happened. He says: "But supposing he had, it would not carry the case a bit further. You cannot have consideration

(1) 44 L. J. (Ch.) 489, 490.

without either contract in the first instance, or such notice on the part of the person benefited by the voluntary instrument after knowledge of it, as changes his position. That is, in fact, contract also, but implied contract. If you have express contract, *cadit quæstio*, and there is nothing to argue. In the case of further security, the lender gives time and forbearance, or he gives some other advantage to the person giving the further security, and that is valuable consideration. But if, without that, after the voluntary instrument has been executed, its contents are communicated to the person taking the benefit of it, and acting upon the faith of it he does substantially alter his position, that is, he does communicate to the donor his acceptance of the further security, and by so doing he gives value to the donor, being the value which the donor expected him to give, he has, in fact, accepted the voluntary instrument as a consideration for the action he takes upon the faith of it. In that way it comes back again really to contract, and upon that ground it is that the Courts have refused to disturb voluntary deeds where consideration has been given for them, so to say, *ex post facto*. But where the lender has no knowledge, it is impossible that he can give consideration in that way, and therefore I hold that mere constructive notice would not be sufficient."

Now it appears to me that that is a clear decision that, where a deed giving further security is executed, but the person executing it holds it back and does not communicate it in any way to the person in whose favour it is executed, there being no express agreement to give further time or to forbear to sue, there being no circumstances upon which such an agreement can be implied, and the fact that no notice was given being absolutely inconsistent with any such *ex post facto* consideration as is mentioned by Sir George Jessel, in such a case the deed is purely voluntary, and would be held so by the Courts.

If that is a true statement of the law, it appears to me that in this case there is nothing which can be seized upon as valuable consideration for the interest which the plaintiffs have acquired, if they have acquired an interest, in this policy. It is true that various cases were called to my attention which were said to be

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PARKER J. inconsistent with the law as laid down in the cases I have already mentioned. One of those cases was *Middleton v. Pollock*. (1) In that case the Master of the Rolls, again Sir George Jessel, came to the conclusion that there had been what he refers to as good consideration, and what, no doubt, is really a valuable consideration, for the purposes of the question he was considering, which arose under the statute of 13 Eliz. c. 5. I am not quite sure that I entirely understand the case, because it will be remembered that the statute of Elizabeth avoids all conveyances and transfers of property which are made with the intent to defraud and delay creditors, but it contains a proviso saving any transfer or conveyance made bona fide for good consideration to a person having no notice of the fraudulent intent. I am not entirely satisfied whether the Master of the Rolls in his judgment is dealing with the question whether there was a fraudulent intent, or whether he is dealing with the question whether, admitting there was a fraudulent intent, the persons claiming were within the protective proviso. But of this I am certain, that on the particular circumstances of the case, which I need not go into, Sir George Jessel did come to the conclusion that there was good consideration, and, that being so, he practically held that the case was not the same sort of case as *In re Barker's Estate* (2), which he had shortly before decided.

I had also my attention called to another case (3) where Vaughan Williams J. used some expression with regard to consideration from which I was asked to infer that in his opinion the mere existence of a debt was sufficient consideration for a security without any actual forbearance or promise to forbear. I do not so read the remarks of the learned judge, and as he held in that case there was good consideration, in a variation of the terms on which the loan was made, namely, a reduction of interest from 6 to 5 per cent., it can only amount to a dictum, and I do not think it is a dictum I ought to follow in face of all the other authorities which appear to go in the other direction.

It was also said that if I examined the case of *New, Prance, and Garrard's Trustee v. Hunting* (4), reported also in the House of

(1) 2 Ch. D. 104.

(3) [1894] 3 Ch. 678, 688.

(2) 44 L. J. (Ch.) 487.

(4) [1897] 2 Q. B. 19.

Lords under the name of *Sharp v. Jackson* (1), I should find that it must have been assumed throughout that case that a security given by deed, but not communicated, was given for valuable consideration, the valuable consideration consisting of an antecedent debt. As a matter of fact, I find no such thing in the case itself. (2) The case itself turns entirely upon what is or what is not fraudulent preference for the purposes of the administration of the law in bankruptcy. But I am asked to infer that the judges in the case must have thought that an antecedent debt was good consideration for a further security, because it is said that, if they had not done so, the particular security which was in question in the case would have been voluntary, and therefore bad in bankruptcy under a totally different section of the Act. I do not know how that may be, but I do not think that any inference can be drawn from a case of that sort which would justify me in treating it as a decision of law on a matter with which the judges were evidently not intending to deal in the slightest degree.

It seems to me, therefore, that there is no authority against, and a great many authorities in favour of, the proposition that in order to have a consideration for a further security there must be an agreement, express or implied, to give time or some further consideration, or else there must be an actual forbearance which *ex post facto* may become the consideration to support the deed. None of those things exist in this case; therefore I am bound to hold that the deed was purely voluntary, and that the interest which was acquired under it, if they did acquire any interest under it, by the persons in whose favour it was executed was not an interest acquired for value.

That being the case, I do not think it is really necessary for me to give a decision on the other point, namely, whether the deed itself was executed upon a condition which was not fulfilled and is merely an escrow, or whether it was executed unconditionally to take effect in any event. I do not intend to go into those questions, because I am satisfied that in any event, even if I treat the deed as having been delivered unconditionally, the

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(1) [1899] A. C. 419.

(2) What does appear is that any objection founded on the deed having

been voluntary was expressly waived by counsel.

PARKER J. plaintiffs are not assigns for value within the meaning of the exception contained in the policy, and therefore the policy is, as between the insurance society and them, void under the condition. Under the circumstances, therefore, this action must be dismissed with costs.

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Solicitors: *Wigan, Champernowne & Prescott; Capron & Co.*

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In re PEARSE'S SETTLEMENT.

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[1907 P. 2647.]

Marriage Settlement—Covenant to settle Wife's after-acquired Property—Construction—Land in Jersey—Consideration for Transfer necessary—Covenant incapable of being performed.

A marriage settlement, executed in 1897, contained a covenant whereby it was agreed that all real and personal property to which A. M. H., the intended wife, then was or at any time during her coverture should be or become entitled, "except her freehold and leasehold property in Jersey, and any cash, stocks, funds, or other securities, now in the actual possession, or standing in the name of A. M. H.," should be assured and transferred by A. M. H., and all other necessary parties, if any, to the trustees of the settlement upon trust to sell and hold the proceeds upon the trusts relating to the wife's trust fund. At the date of the settlement A. M. H. was absolutely entitled to certain real estate in Jersey.

In 1901 she became absolutely entitled to a share in certain other freehold property in Jersey. By the law of that country trusts of this character were not recognized, and all transfers of property were required to be made for adequate pecuniary consideration:—

Held, that although the words of the exception in the covenant did not exclude the subsequently acquired property of the wife in Jersey, yet, having regard to the law of Jersey which rendered the transfer of such property to the trustees inoperative, it was not caught by the covenant to settle.

In re Dunsany's Settlement, [1906] 1 Ch. 578, applied.

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By a marriage settlement dated February 24, 1897, made between the defendant Arthur Pearse of the first part, the

defendant Annie Marguerite Pearse (then Annie Marguerite Hedger) of the second part, and the plaintiffs Alfred Cosburn Pearse and Ernest Balfour Trotter (the trustees) of the third part, the defendant Arthur Pearse settled certain policies of assurance and chattels as therein mentioned, and the defendant Annie Marguerite Pearse assigned to the plaintiffs her share and interest in certain other premises therein mentioned, and it was declared that the trustees should stand possessed of the wife's trust fund and the investments representing the same upon trust, during the joint lives of the husband and wife, to pay the income to the wife during her life, for her separate use, without power of anticipation, and after the death of one of them to pay the income to the survivor during his or her life, and after the death of the survivor the trustees were to stand possessed of the wife's trust fund and the other premises therein referred to upon trusts for the issue of the marriage in the usual form. Paragraph 11 of the settlement was as follows: "It is hereby agreed and declared that all real and personal property (if any) not hereinbefore settled, to which the said Annie Marguerite Hedger now is, or at any time during her now intended coverture shall be or become entitled, whether in possession, reversion, or otherwise (except her freehold and leasehold property in Jersey, and any cash, stocks, funds, or other securities, now in the actual possession, or standing in the name of the said Annie Marguerite Hedger, and except also jewels, trinkets, ornaments of the person, plate, linen, china furniture, pictures, prints, books, and articles of the like nature, and except also any property acquired at one and the same time not exceeding in amount or value the sum of 300*l.*) shall, so soon as circumstances will admit, and at the cost of the trust estate, be assured and transferred by the said Annie Marguerite Hedger, and all other necessary parties (if any) unto, or otherwise vested in the trustees, Upon trust that the trustees shall, at such time or times, and in such manner as they shall think fit (but as to reversionary property not until it shall fall into possession, unless it shall appear to the trustees that an earlier sale would be beneficial) sell, call in, and convert into money such part or parts of the said property as shall not consist of

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money, or of investments of the nature hereinafter authorized, and shall stand possessed of such part of the said property as shall consist of authorized investments, or of money uninvested, and also of the money to arise from such sale, calling in, and conversion, as aforesaid upon the trusts and with and subject to the powers and provisions hereinbefore declared and contained concerning the wife's trust fund."

The marriage took place, and there were issue of the same two children only, the defendants Edith Mary Pearse and Gertrude Ethel Pearse, both infants. At the date of the marriage settlement Annie Marguerite Pearse was absolutely entitled to certain messuages and premises at St. Heliers, in the island of Jersey, of the value of 2475*l.* In October, 1901, upon the death of her great aunt, Julia Westaway, she became absolutely entitled, as one of the co-heirs of the deceased, to a share in certain other freehold property in Jersey of the value of 2790*l.*; and, upon a partition, various cottages and houses became vested in her. In 1902 and subsequently, with the concurrence of her husband, she made certain mortgages of her property in Jersey to the amount of 3550*l.*, and they were duly registered and purported to be charged upon all her property in Jersey, both that which she possessed at the date of the settlement, and that which was afterwards acquired. The mortgages were created in the belief that all Jersey property was excepted from the settlement, and neither the defendant nor her husband had the necessary means to redeem the mortgaged premises or any of them. A question having arisen as to whether the subsequently acquired property in Jersey was not in fact caught by the covenant to settle after-acquired property, the trustees of the settlement took out a summons on December 2, 1907, to have that question determined.

With regard to the law of Jersey relating to real estate there was evidence in an affidavit made by Henry Edward Le Vavas seur Durell, Solicitor-General for the island of Jersey, to the following effect. There was a system of registration of title in the island, and no one except the registered proprietor of lands or houses could deal with the same. The Courts of Jersey did not recognize trusts of lands or houses, except under local statutes

relating to industrial enterprises and for charitable purposes, and no trust of realty could be entered on the register, and consequently the agreement to settle the real estate in Jersey was not enforceable in the island. The defendant Annie Marguerite Pearse could, with the concurrence of her husband, transfer the properties in question to the plaintiffs in their own private capacity (not as trustees), and they would be treated as absolute owners subject to the rights of registered creditors, and they would also have to satisfy the claims of unregistered creditors. There must, however, be adequate pecuniary consideration for the transfer, the consideration of marriage not being sufficient to render the transfer valid. The wife could sell the property, with the concurrence of her husband, to a third party, but the non-registered creditors might intervene to prevent the sale unless their claims were satisfied, the transferee not being responsible for such claims. Further, the husband's rights over the wife's real estate in Jersey were that during the marriage he could claim the income arising from the property, and in the event of his wife's death, there being issue of the marriage, he would have a life interest in such real estate while he remained unmarried.

S. Leeke, for the trustees.

Tyldesley Jones, for the husband and wife. The words of the exception in the covenant are wide enough to exclude the after-acquired property in Jersey. But if not, having regard to the law of Jersey which, amongst other things, requires a transfer to be made for adequate pecuniary consideration, it could not have been the intention that the property in question should be bound by this covenant, as it is impossible to perform it: *Hilbers v. Parkinson* (1), which case was approved and followed in *In re Dunsany's Settlement*. (2) There it was held that an estate tail, to which a wife became entitled in remainder during the coverture, was not bound by a covenant of this character. To attempt to make the covenant apply would be "doing an idle thing," as Chitty J. said in the case of *In re Allnutt* (3) when referring to

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(1) (1883) 25 Ch. D. 200.

(2) [1906] 1 Ch. 578.

(3) (1882) 22 Ch. D. 275, 280.

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Brooks v. Keith. (1) The Court would not require a useless act to be performed, or one which the law of the country where the land was situated would not permit: *Ex parte Pollard.* (2)

A further difficulty arises from the fact that there is no covenant by the husband to convey, and he cannot be compelled to do so. The burden of proof that this property was intended to be included in the covenant lies on those who are entitled in remainder.

J. W. M. Holmes, for the infant children of the marriage. This covenant is executory, and the Court can mould it so as to effectuate the intention of the parties. It can be enforced by the Court by means of a sale of the lands and houses and the payment of the proceeds to the trustees. That was done in *Master v. De Croismar.* (3) It cannot be considered a straining of the covenant, as there is a trust for sale when the property comes into the hands of the trustees. The covenant can therefore be performed in substance, and would carry out the intention of the parties to settle all the property of the wife except that which was expressly excluded.

EVE J. I do not think that this case is by any means clear. The lady, who was a native of Jersey, married in the year 1897, and by her marriage settlement, dated February 24, 1897, she assigned certain property in which she was interested to the trustees, to be held upon the usual trusts of a marriage settlement. There was a covenant to settle the wife's after-acquired property. [His Lordship read clause 11 of the settlement.] At the date of the settlement, the lady was seised of and entitled to certain freeholds and leaseholds in Jersey. Since the date of the settlement, in consequence of the death, intestate, of a relative, she became entitled to an undivided share in certain other real property in Jersey, and by a partition between the persons entitled to the property she is now entitled to certain specific items constituting part of the estate of the intestate. The question which has arisen is this: Is her interest in the estate so vested in her caught by this covenant to settle her after-acquired

(1) (1861) 1 Dr. & Sm. 462.

(2) (1840) Mont. & Ch. 239, 250.

(3) (1848) 11 Beav. 184.

property? She and her husband have dealt with that property on the assumption that it is not so caught. In consequence of certain liabilities which arose on the distribution of that estate, they have charged the property with the repayment of a considerable amount of money, and the only interest still vested in the lady or her husband is the equity of redemption in the properties charged. But that state of circumstances arose only from the construction which the parties chose to put upon the document before me; it cannot, of course, affect the real construction which I have to determine upon this summons. First, is this property swept into the settlement by reason of this covenant to settle after-acquired property? Now, on behalf of the lady, it is said that this property is expressly excepted, and that the words "except her freehold and leasehold property in Jersey" are sufficiently wide to except the freehold of which she was not possessed at the date of the settlement, but which has devolved upon her since. I cannot accede to that argument. I agree that the words are, by themselves, sufficiently wide, but, having regard to the connection in which they occur, and more particularly to the phrase which immediately follows, I think the true operation of that exception is limited to the freeholds and leaseholds of which the lady was possessed at the date of the settlement; so that, in my opinion, the words of exception do not in terms exclude the property to which the lady has subsequently succeeded. On behalf of the lady it is also said that, even assuming that to be so, yet, having regard to the *lex loci* affecting the land in question, this settlement must be read as if it did not include in its operation the lands so situated. It appears from the affidavit by the Solicitor-General of the isle of Jersey, filed in support of that contention, that the interest of the lady in the property, namely, the equity of redemption, is, under the circumstances, burdened with this obligation, that whoever acquires the equity of redemption acquires it with the personal obligation to discharge the mortgages upon it, and if the lady as owner of the equity of redemption seeks to dispose of it, her unsecured creditors are entitled to intervene with the view of having the sale prohibited.

But, so far as this lady is concerned, she can only dispose of

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her property by a sale with the concurrence of her husband, and the husband, so long as he keeps down the interest on the charge, is entitled to receive the rents during the coverture, and if he survives his wife there being issue, he is entitled to a life interest in the real estate. The difficulty, however, does not arise merely upon these incidents. According to the law of Jersey, neither the lady nor her husband are competent to effect a transfer of this property to the trustees of the settlement upon the trusts of the settlement unless there passes from the trustees to the vendors adequate pecuniary consideration for the transfer; in other words, the execution by this lady and her husband of what would be equivalent to a conveyance of this land to the trustees as trustees would be inoperative, inasmuch as there would not be received from the trustees any pecuniary consideration. It is true, as I have said, that the property can be transferred to the trustees, but it must be for pecuniary consideration, and if it is so assured, the trustees would of course hold it subject to all the obligations attaching to it. Under these circumstances, that being the position, and also bearing in mind that there is no covenant by the husband to vest in the trustees his interest in the property, what I have to determine is, ought I so to read this settlement as to hold that it was intended by this covenant as to the wife's after-acquired property that the wife should assure this property to the trustees?

Mr. Holmes has founded an argument upon the case of *Master v. De Croismar* (1) and says that the wife's interest can be got in by other means, that is, by a realization of her interest in these properties and payment of the proceeds to the trustees. But I am bound to regard the express terms of the covenant; it is not to sell and to pay the proceeds to the trustees, but that the wife will assure to them the items of property which are the subject-matter of the covenant to settle. I think that, on principle, this case is really covered by the decision in *In re Dunsany's Settlement*. (2) There a lady became entitled to an estate tail, and although it vested in her a life interest, it could not really be described as an estate made up of a life interest and something more. It was really an estate tail, and it was pointed out by the

(1) 11 Beav. 184.

(2) [1906] 1 Ch. 578.

Lords Justices in the course of the argument that it would be very difficult—in fact it would be impossible—to frame a conveyance of an estate tail to the trustees, and on that ground, namely, the impossibility of vesting in the trustees the interest which the lady had taken, the Court held that the parties could not have intended to have included such an interest within the scope of the covenant to settle after-acquired property. I think the present case is within the ratio decidendi of that case. Here we have an interest which it is impossible, having regard to the law of Jersey, to assure to the trustees upon the trusts of the settlement. That being so, I think I must hold that the property in question is not caught by the covenant to settle.

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Solicitors: *Trotter & Patteson.*

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SALMON *v.* QUIN & AXTENS, LIMITED.

[1908 S. 4090.]

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Dec. 4, 5.

Company—Directors—Powers—Articles of Association—Construction—Vesting of Management in Directors—Control of Management by Company in General Meeting.

By the articles of association of a company the general management of the business of the company was vested in the directors subject to such regulations (being not inconsistent with the provisions of the articles) as might be prescribed by the company in general meeting, and it was provided that no resolution of a meeting of the directors having for its object (among other things) the acquisition or letting of any premises should be valid unless twenty-four hours' notice of the meeting should have been given to each of the managing directors A. and B. and neither of them should have dissented therefrom in writing before or at the meeting. A. and B. held the bulk of the ordinary shares in the company. Resolutions were passed by the directors for the acquisition of certain premises and for the letting of certain other premises, but B. dissented from each of these resolutions in accordance with the articles. At an extraordinary general meeting of the company resolutions to the same effect were passed by a simple majority of the shareholders:—

Held, applying the principle of *Automatic Self-Cleansing Filter Syndicate Co. v. Cuninghame*, [1906] 2 Ch. 34, that the resolutions of

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the company were inconsistent with the provisions of the articles and that the company ought to be restrained from acting upon them.

APPEAL from a decision of Warrington J.

Quin & Axtens, Limited, was incorporated on August 31, 1905, with a capital of 120,000*l.* divided into 60,000 cumulative preference shares of 1*l.* each and 60,000 ordinary shares of 1*l.* each.

The principal object of the company as stated by clause 3 (A) of the memorandum of association was to acquire and take over as a going concern the business of drapers and furnishing and general warehousemen then carried on at Nos. 422 to 440, Brixton Road, under the style of "Quin & Axtens."

Other objects of the company were :

"(M) To purchase, take on lease or in exchange, hire or otherwise acquire any real or personal property, rights or privileges which the company may think suitable or convenient for any purposes of its business; and to erect and construct buildings and works of all kinds."

"(Q) To sell, let, develop, dispose of or otherwise deal with the undertaking, or all or any part of the property of the company, upon any terms, with power to accept as the consideration any shares, stocks or obligations of or interest in any other company."

The articles provided (article 65) that the holders of preference shares should not be entitled to vote at any general meeting except in certain events which had not happened, and further (article 72) that the first directors should be William Raymond Axtens, Joseph Salmon, and Arthur Hemsley Way, and that Axtens should be the chairman of the board of directors, and that he and Salmon should be managing directors of the company. The other material articles were as follows :—

"75. The business of the company shall be managed by the board, who may pay all expenses of or incident to the formation, registration, and advertising of the company, and the issue of its capital. The board may exercise all the powers of the company, subject, nevertheless, to the provisions of any Acts of Parliament or of these articles, and to such regulations (being not inconsistent with any such provisions of these articles) as

may be prescribed by the company in general meeting, but no regulations made by the company in general meeting shall invalidate any prior act of the board which would have been valid if such regulations had not been made."

Article 76, without restricting the generality of the foregoing powers, provided that the directors might do a series of things therein enumerated, including "(J) sell, let, exchange, or otherwise dispose of absolutely or conditionally, all or any part of the property, privileges and undertaking of the company upon such terms and conditions as they may think fit."

"80. No resolution of a meeting of the directors having for its object the borrowing of money, the entering into any contract the subject-matter of which shall be of a value exceeding 1000*l.*, the acquisition by purchase, lease or otherwise, or the sale, leasing, letting, mortgaging or charging of any hereditaments or premises, the renewal or extension of any existing lease or tenancy or the acquisition of any reversionary lease, the opening of any additional shop or branch of the company's business, the carrying on of any business or class of business not then carried on by the company, the convening of an extraordinary general meeting of the company other than a meeting convened pursuant to a requisition of shareholders under section 13 of the Companies Act, 1900, or any matter affecting the rights of either of them, the said William Raymond Axtens and Joseph Salmon, as holders of ordinary shares of the company shall be valid or binding unless not less than twenty-four hours' notice in writing by letter or telegram of the meeting specifying the business proposed to be transacted thereat, shall have been given to each of the managing directors, the said William Raymond Axtens and Joseph Salmon, and neither of them shall have dissented therefrom in writing before or at the meeting at which such resolution is put to the vote."

Of the cumulative preference shares 30,000 only had been issued. Of the ordinary shares 50,007 only had been issued, and of these Axtens held 27,240 and Salmon 22,085. Of the balance 250 were held by Edward Boys-Tombs, 250 by a brother of Salmon, and the remaining shares were distributed amongst various small holders. All the shares were fully paid.

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Axtens and Salmon were managing directors at the date of these proceedings; Way retired from the board in 1906, and Boys-Tombs was appointed a director in his place.

In 1908 questions arose as to the acquisition of certain premises, No. 426, Brixton Road. On August 1 a meeting of the directors was held, at which a resolution was passed directing the company's solicitors to continue negotiations as to the purchase of the premises for 2000*l.* with 100*l.* for the purchase of the existing tenant's interest. From this resolution Salmon dissented in writing in accordance with the terms of article 80.

On August 19 a meeting of the directors was held, at which resolutions were passed that a proposal for letting No. 252, Stockwell Road, forming part of the company's property, to a Mr. Hayden for a term of years should be entertained, and that an issue of 6000*l.* of the unissued ordinary share capital of the company should be made. From each of these resolutions Salmon also dissented in writing under the terms of article 80.

On September 26 notice was given, pursuant to a requisition of certain shareholders, of an extraordinary general meeting of the company to be held on October 6 for the purpose of considering and, if thought fit, passing resolutions similar in terms to those passed at the directors' meetings on August 1 and 19.

On October 6 the meeting was held and the resolutions were submitted to the shareholders and, after a protracted discussion, were upon a show of hands declared lost. Subsequently a poll was demanded, and the meeting was adjourned for a month. The adjourned meeting was held on November 6, when the resolutions were, upon a poll being taken, passed by the preponderance of Axtens' votes.

Thereupon Salmon, suing on behalf of himself and all other shareholders of the company except the defendants, commenced this action against the company and Axtens and Boys-Tombs for an injunction to restrain the defendants from acting upon any of the resolutions passed at the adjourned extraordinary general meeting and moved for an interlocutory injunction in the terms of the writ.

Warrington J., distinguishing *Automatic Self-Cleansing Filter*

Syndicate Co. v. Cuninghame (1), held that the resolutions in question were not inconsistent with any of the provisions of the articles, inasmuch as article 80 referred only to resolutions of the directors, and he refused the motion.

The plaintiff appealed.

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Jessel, K.C., F. Daldy, and A. B. Nutter, for the plaintiff. Article 80 was inserted primarily for the protection of the plaintiff, and any resolution submitted to the board and rejected under that article cannot be subsequently submitted to a general meeting of shareholders and passed by simply a majority, inasmuch as by article 75 the company has delegated to the directors its right to manage its business, and the article provides that the regulations of a general meeting must not be inconsistent with the articles of association. The resolutions in question are inconsistent with article 80. Warrington J. has in effect decided that a general meeting can by a simple majority render article 80 in effect nugatory, that is to say that a simple majority can alter the articles of association, whereas that can only be done by a special resolution. It cannot have been intended that Axtens as a shareholder should be able to do what Axtens as a director was unable to do.

This case is governed by the principle of *Automatic Self-Cleansing Filter Syndicate Co. v. Cuninghame* (1) and by the dicta of Fletcher Moulton and Buckley L.JJ. in *Gramophone and Typewriter, Ltd. v. Stanley*. (2) *Marshall's Valve Gear Co. v. Manning, Wardle & Co.* (3) is distinguishable in its facts because there the directors were acting for their own personal ends, but the observations of Neville J. are inconsistent with the principle of the judgments in the *Automatic Case* (1) and with the dicta of the Lords Justices in the *Gramophone Case*. (2) That principle is that you must not assume that a majority of the members in general meeting can overrule the decision of the directors, whatever the powers of management given to the directors by the articles, but you must look at the terms of the articles to see what those powers of management

(1) [1906] 2 Ch. 34.

(2) [1908] 2 K. B. 89, 98, 105.

(3) (1908) 25 Times L. R. 69;
since reported ante, p. 267.

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are, and, where by the articles the general powers of management are vested in the directors, the company in general meeting cannot take into its own hands part of the general management. The same principle applies also in the United States: Angell and Ames on The Law of Private Corporations, 8th ed. s. 231.

[FARWELL L.J. referred to *Bainbridge v. Smith*. (1)]

That case, as appears from the judgment of Cotton L.J., really depended on the principle that the Court will not direct specific performance of a contract for personal service, and it cannot be regarded as an authority governing this case. [They also referred to *In re Anglo-Danubian Steam Navigation and Colliery Co.* (2)]

[The COURT intimated that the injunction, if granted, ought not to extend to the resolution authorizing the issue of shares.]

Cave, K.C., and *Vernon*, for the defendants, objected that the company ought to have been made plaintiff, inasmuch as the complaint was made in respect of matters which were not ultra vires of the company, and in support of their objection they referred to Buckley on Companies, 8th ed. p. 548, and the cases there cited.

[The COURT having overruled the objection, the case was then argued on the merits.]

Reading article 75 in conjunction with paragraphs (M) and (Q) of clause 3 of the memorandum of association, the true view is that the company reserves to itself by the shareholders in general meeting the right to control the powers granted to the board. Article 75, which confers general powers of management on the directors, contains the qualification that those powers shall be subject to such regulations, being not inconsistent with the articles, as may be prescribed by the company in general meeting. That means such directions as may be given by the company in general meeting from time to time to the board for their guidance.

[FARWELL L.J. In Palmer's Company Precedents, 9th ed., pt. i. p. 519, the term "regulations" is treated as practically synonymous with articles.]

(1) (1889) 41 Ch. D. 462.

(2) (1875) L. R. 20 Eq. 339.

That cannot be the meaning in this article. The meaning of the word must be governed by the context, and the context here shews that it must be used in a sense different from articles, which can only be altered by special resolution. The same observation applies to the use of the word in the article in question in the *Automatic Case* (1), because the powers of the directors were there made subject to such regulations as might from time to time be made by extraordinary resolution. There is a material distinction between that case and the present, because there the decision proceeded on the footing that the resolution of the shareholders did not comply with the terms of the articles, which required an extraordinary resolution. Article 75 is taken from article 55 in table A, and in the notes to that article in Buckley on Companies, 8th ed. p. 558, the term "regulations" is treated as equivalent to directions given by the general meeting, for it is stated that "the company in general meeting have no doubt power to direct and control the board in the management of the affairs of the company," and *Isle of Wight Ry. Co. v. Tahourdin* (2) is cited.

[COZENS-HARDY M.R. That must be taken subject to the observations of this Court as to the scope of that decision in the *Automatic Case*. (1)]

Then, assuming regulations to be equivalent to directions, these resolutions are not inconsistent with article 80, which relates only to resolutions of the directors. Upon the construction of these articles there was no irrevocable delegation by the company of its powers to the directors. [They also referred to *Grant v. United Kingdom Switchback Rys. Co.* (3)]

FARWELL L.J., at the request of the Master of the Rolls, delivered the first judgment as follows:—This is an appeal from a decision of Warrington J., and with all respect I am unable to agree with the conclusion at which he has arrived. The company is of a type not unusual nowadays, in which the shares are held almost entirely by two people. Of the 50,007 shares Mr. Axtens holds 27,240 and Mr. Salmon

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(1) [1906] 2 Ch. 34.

(2) (1883) 25 Ch. D. 320, 331.

(3) (1888) 40 Ch. D. 135.

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22,085. Now the management is entrusted to the board of directors, and there is a curious provision which I will read in a moment. The difficulty has arisen in this way. The majority of the board desire to acquire a lease of certain premises for the sum of 2000*l.* or upwards. They also desire to demise certain vacant premises belonging to the company. The material articles are articles 75 and 80. Article 75 provides as follows:

[His Lordship read it.] Pausing there for a moment, it appears to me to be plain that this is a contract by which the business of the company shall be managed by the board. The articles, by s. 16 of the Act of 1862, are made equivalent to a deed of covenant signed by all the shareholders. The Act does not say with whom that covenant is entered into, and there have no doubt been varying statements by learned judges, some of them saying it is with the company, some of them saying it is both with the company and with the shareholders. Stirling J. in *Wood v. Odessa Waterworks Co.* (1) says:

“The articles of association constitute a contract not merely between the shareholders and the company, but between each individual shareholder and every other.” I think that that is accurate subject to this observation, that it may well be that the Court would not enforce the covenant as between individual shareholders in most cases. Now the general power of the board to manage here is qualified by the stipulation which follows, that it is to be subject to the provisions of these articles. I therefore turn to article 80, and I find this provision to which these general powers of management are made subject: [His Lordship read the article.] In the present case Mr. Salmon did so dissent according to the terms of that article, and therefore the veto therein provided came into operation. That was met by the company being called together by a requisition of seven shareholders and by passing general resolutions for the acquisition of this property and the letting of the vacant premises. It is said that those resolutions are of no effect, and I am of opinion that that contention is right. I base my opinion on the words of article 75, “subject, nevertheless, to the provisions of any Acts of Parliament or of these articles,” which I read to be

(1) (1889) 42 Ch. D. 636, 642.

“subject, nevertheless, to article 80,” “and to such regulations (being not inconsistent with any such provisions of these articles) as may be prescribed by the company in general meeting.” That is to say, “subject also to such regulations not inconsistent with article 80 as may be prescribed by the company in general meeting.” But these resolutions are absolutely inconsistent with article 80 ; in truth this is an attempt to alter the terms of the contract between the parties by a simple resolution instead of by a special resolution. The articles forming this contract, under which the business of the company shall be managed by the board, contain a most usual and proper requirement, because a business does require a head to look after it, and a head that shall not be interfered with unnecessarily. Then in order to oust the directors a special resolution would be required. The case is, in my view, entirely governed, if not by the decision, at any rate by the reasoning of the Lords Justices in *Automatic Self-Cleansing Filter Syndicate Co. v. Cuninghame* (1) and *Gramophone and Typewriter, Ltd. v. Stanley*. (2) I will only refer to one passage in Buckley L.J.’s judgment in the latter case. (3) He says: “This Court decided not long since, in *Automatic Self-Cleansing Filter Syndicate Co. v. Cuninghame* (1), that even a resolution of a numerical majority at a general meeting of the company cannot impose its will upon the directors when the articles have confided to them the control of the company’s affairs. The directors are not servants to obey directions given by the shareholders as individuals ; they are not agents appointed by and bound to serve the shareholders as their principals. They are persons who may by the regulations be entrusted with the control of the business, and if so entrusted they can be dispossessed from that control only by the statutory majority which can alter the articles. Directors are not, I think, bound to comply with the directions even of all the corporators acting as individuals.” That appears to me to express the true view. Any other construction might, I think, be disastrous, because it might lead to an interference by a bare majority very inimical to the interests of the minority who had come into a company on

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(1) [1906] 2 Ch. 34.

(2) [1908] 2 K. B. 89.

(3) [1908] 2 K. B. 105.

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the footing that the business should be managed by the board of directors.

The only other observation I wish to make is with reference to a passage in Buckley on Companies, 8th ed. p. 558, which purports to be based upon the case of *Isle of Wight Ry. Co. v. Tahourdin*. (1) I think it is overlooked in that passage that that was a decision on the Companies Clauses Act, and, as pointed out by the present Master of the Rolls in the *Automatic Case* (2), the section in the Companies Clauses Act provides that "the exercise of all such powers shall be subject also to the control and regulation of any general meeting specially convened for the purpose." Then he proceeds, "If those words had been found in the present Act of Parliament the appellants' case would have been comparatively clear." That seems to me to take away any force or applicability of the case of *Isle of Wight Ry. Co. v. Tahourdin* (1), and in this case I think that Warrington J. has not really given proper weight to his own former decision in the *Automatic Case* (3), which was affirmed in the Court of Appeal.

I think that this appeal must be allowed with costs here and below.

COZENS-HARDY M.R. I agree. The injunction will not extend to the resolutions relating to the issue of capital.

Solicitors : *Bartlett & Gluckstein ; Redfern & Hunt.*

(1) 25 Ch. D. 320.

(2) [1906] 2 Ch. 46.

(3) [1906] 2 Ch. 34.

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[1908 J. 555.]

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Mortgage—Equitable Mortgages—Subsequent Execution by Mortgagor of Deed of Assignment of all his Property for Benefit of Creditors—Registration—Priorities—Yorkshire Registries Act, 1884 (47 & 48 Vict. c. 54), s. 14.

On October 3, 1906, C. executed a legal mortgage of land situate in Yorkshire to a bank, and that mortgage was duly registered under the Yorkshire Registries Act, 1884. C. had previously created an equitable charge on the land in favour of H. & W., but that charge was not registered until October 5, 1907. On August 30, 1907, C. executed a deed of assignment in common form of all his real and personal estate to a trustee for the benefit of his creditors generally, and that deed was registered on September 11, 1907. There were other equitable mortgages which had been created by C. prior to 1907, but which had not been registered. In 1908 the bank sold the property comprised in their security, and after satisfying their claim had a balance in their hands. This balance was claimed by the trustee as against H. & W. on the ground that his deed, though later in date of execution than H. & W.'s charge, was prior to it in date of registration :—

Held, upon the construction of the deed, that only such interest in the property as C. then possessed passed to his trustee, namely, the property subject to the equitable mortgages upon it, and therefore that the question as to priority of registration did not arise.

Held, therefore, that the claim of the trustee must be postponed to the claims of all the prior equitable mortgagees who established them, whether their mortgages were registered or not.

TRIAL OF INTERPLEADER ISSUE.

In 1868 Richard Cooper was the owner in fee of a house and shop in the Green, Thorne, in the county of York, and of an undivided moiety of certain cottages in Finkle Street, Thorne, aforesaid.

On February 19, 1868, Cooper mortgaged both these properties to Charles Chappell. The mortgage deed was duly registered.

In September, 1870, he deposited certain of the deeds relating to part of the property with Abraham Cockroft to secure the repayment of 300*l.* and interest. The documents relating to the deposit were not registered. The defendant Mrs. Emma Barker claimed to be entitled to this charge.

On April 17, 1872, the executors of Chappell reconveyed to

WARRING- Cooper the property comprised in their mortgage of February 19,
TON J. 1868. This reconveyance was also duly registered.

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On September 3, 1875, Cooper signed a memorandum of deposit in favour of the Doncaster branch of the Yorkshire Banking Company, who were the predecessors of, and afterwards amalgamated with, the London City and Midland Bank, and deposited with them certain documents of title relating to the property by way of equitable mortgage to secure an overdraft at the bank. This memorandum was not registered.

On April 25, 1900, Cooper deposited with Abraham Barley, senior, and Abraham Barley, junior, the mortgage of February 19, 1868, and the reconveyance of April 17, 1872, by way of equitable mortgage to secure the repayment of 200*l.*, which was afterwards increased to 300*l.* This deposit was not registered.

On June 24, 1903, Cooper signed a further memorandum of deposit in favour of the London City and Midland Bank, giving them a further charge, and deposited with them further deeds and documents by way of equitable mortgage to secure his overdraft. This deposit was not registered.

On July 16, 1906, Cooper, being indebted to the defendants Hotham & Whiting in a sum of 179*l.* 12*s.*, gave them a charge on all the securities then lodged with the Doncaster branch of the London City and Midland Bank. This charge was registered on October 5, 1907, in the Wakefield Registry under the Yorkshire Registries Act, 1884.

On October 3, 1906, Cooper executed a legal mortgage to the London City and Midland Bank of all the property by description comprised in their charge and further charge. This mortgage was registered on October 27, 1906, in the Wakefield Registry.

On August 30, 1907, Cooper executed a deed of assignment to the plaintiff Joshua Jones as trustee for the benefit of his creditors. By that deed, which was made between Cooper (thereinafter called the debtor) of the first part, the plaintiff (thereinafter called the trustee) of the second part, and the several persons, companies, and firms whose names were specified in the schedule thereunder written, being creditors of the debtor, and all other (if any) creditors of the debtor at the date of those

presents of whom the trustee should have notice before paying a dividend as thereafter contained (all of whom were thereafter called the creditors) of the third part, it was witnessed that, in consideration of the release and discharge from the creditors respectively to the debtor thereafter contained, the debtor, as beneficial owner, thereby conveyed and assigned to the trustee "all the real and personal estate and effects whatsoever and wheresoever of or belonging or due or owing to the debtor (except property of a leasehold tenure and such property as would be excepted in the case of bankruptcy)" to hold the same unto the trustee as to the real estate to the use of the trustee in fee simple, and as to all the premises upon trust to sell and to stand possessed of the proceeds, in the first place to pay thereout all solicitors' and accountants' costs, charges, and expenses of preparing and carrying out the deed, and in the next place "to pay divide and distribute the residue of the said trust moneys unto and amongst all and every the creditors in the like manner and priority as if the same were being administered in bankruptcy until they shall have been paid the full amount of their respective debts and in case of any surplus to pay the same to the debtor." And the deed provided that, in consideration of the premises and of the grant and assignment thereinbefore contained, the creditors thereby released the debtor from all debts due to them and from all actions, claims, and demands which they had against him. The deed was registered on September 11, 1907, in the Wakefield Registry under the Yorkshire Registries Act, 1884.

This deed was not actually executed by the creditors, but many of them assented to it in writing.

On January 22, 1908, the London City and Midland Bank sold the property under the power of sale contained in their mortgage, and after satisfying their claim for principal, interest, and costs there remained in their hands a balance of 233*l.* 17*s.* 4*d.*

On March 23, 1908, the plaintiff commenced the present action against the bank claiming payment to him of the 233*l.* 17*s.* 4*d.* The various incumbrancers thereupon gave notice to the bank of their claims.

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In consequence of these claims the bank on April 2, 1908, issued an interpleader summons, and on June 25, 1908, an order by consent was made thereon that the bank should hold the 233*l.* 17*s.* 4*d.* as stakeholders, and that all further proceedings in the action should be stayed as against them. And it was further ordered that the parties other than the bank should proceed to the trial of the following issue before the judge in Middlesex with witnesses touching the matters in dispute raised by the action, in which the plaintiff should be the plaintiff and Emma Barker, Hotham & Whiting, Abraham Barley, senior, and Abraham Barley, junior, should be the defendants—namely, whether (a) the plaintiff, as the trustee and assignee under his deed of assignment, or (b) Mrs. Barker, as the ultimate and present assignee of Abraham Cockroft, or (c) Messrs. Hotham & Whiting, claiming to be entitled to the benefit of the charge of July 16, 1906, or (d) the Messrs. Barley, or any and which of them, and in what order and priority, was or were entitled to the sum of 233*l.* 17*s.* 4*d.*, or to any and what part thereof.

The issue was tried before Warrington J. on December 8 and 9, 1908.

It was admitted that the legal mortgage to the bank took priority over the plaintiff's deed and the equitable charges of the various defendants.

The only matter calling for a report was whether the plaintiff, by reason of the prior registration of his deed of assignment of August 30, 1907, was entitled to priority over the other incumbrances, especially over the defendants Hotham & Whiting's charge of July 16, 1906, by reason of the fact that the deed of assignment, though subsequent in date to the charge, was registered before it.

Cave, K.C., and John Henderson, for the plaintiff. The plaintiff is entitled to priority over the defendants Hotham & Whiting by reason of the prior registration of his deed: Yorkshire Registries Act, 1884, s. 14. (1) The deed was assented to

(1) The Yorkshire Registries Act, 1884, s. 14, provides:—

“Subject to the provisions of this Act, all assurances entitled to be

by many of Cooper's creditors, who thereby released their claims against Cooper. It was therefore given for valuable consideration: *Hance v. Harding* (1); *In re Pope*. (2) The case therefore falls within the last clause of s. 14 of the Act, and it is immaterial whether or not the plaintiff had notice of the prior unregistered incumbrances. Even assuming that the deed originally passed only the equity of redemption, yet by registering his deed the plaintiff acquired priority over all unregistered incumbrancers. This is the effect of s. 14, as it enables a person claiming with valuable consideration, even with notice, to displace every unregistered owner. The deed conveyed all the real and personal estate of the debtor and is to be read as if the same had been therein specifically described. It therefore included his property at Thorne, and it passed all rights in the property which the debtor could convey.

[WARRINGTON J. I think the question is whether the deed conveyed the whole of the debtor's property or only his interest in it.]

Rowden, K.C., and *Owen Thompson*, for the defendants *Hotham & Whiting*; *Bairstow, K.C.*, and *Tyldesley Jones*, for the defendant *Mrs. Barker*; and *J. K. Young*, for the defendants *Barley*, senior, and *Barley*, junior, were not called upon to argue.

WARRINGTON J. When one understands what is really the question for decision in this case, it is, in my opinion, a

registered under this Act shall have priority according to the date of registration thereof, and not according to the date of such assurances, or of the execution thereof

"All priorities given by this Act shall have full effect in all Courts, except in cases of actual fraud, and all persons claiming thereunder any legal or equitable interests shall be entitled to corresponding priorities, and no such person shall lose any such priority merely in consequence of his having been affected with

actual or constructive notice, except in cases of actual fraud; but nothing in this section contained shall operate to confer upon any person claiming without valuable consideration under any person any further priority or protection than would belong to the person under whom he claims; and any disposition of land or charge on land, which if unregistered would be fraudulent and void, shall, notwithstanding registration, be fraudulent and void in like manner."

(1) (1888) 20 Q. B. D. 732.

(2) [1908] 2 K. B. 169.

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comparatively simple one, because it depends entirely on the construction of the deed of assignment for the benefit of the creditors of August 30, 1907. Now the matter arises in this way. Richard Cooper was entitled to certain freehold hereditaments situate at Thorne, near Doncaster, in the county of York. On October 3, 1906, he executed a legal mortgage of those hereditaments to the London City and Midland Bank. That mortgage was registered on October 27, 1906, and there is no dispute that it took priority over any other incumbrances on the land. The bank have sold, and they have in hand a sum of money, being the surplus of the proceeds of sale after satisfying their claims, and the dispute is as to the persons to whom that sum of money ought to be paid. It is claimed by the plaintiff, the trustee under the deed of assignment for the benefit of creditors, which I have already mentioned, and if his claim prevails it will dispose of the claims of the other claimants. The other claimants are persons who claim under various equitable mortgages made at various times by Cooper, and between whom there may be questions of priority, having regard to the dates of registration, but at present I have nothing to do with that. The case now before me is this, that at the date of the execution of the deed Cooper was possessed of these properties subject to a first legal mortgage to the bank and subject also to certain equitable mortgages which rank after the mortgage to the bank.

The case put by the trustee under the deed is this: He says that the deed was a conveyance to him of the hereditaments as if they had been specifically described in the deed, that is to say, an absolute conveyance, and that by the registration of that conveyance under the Yorkshire Registries Act, 1884, before the registration of any of the equitable incumbrances, he obtained priority over those equitable incumbrances, though, of course, he could not get priority over the legal mortgage to the bank which had been previously registered. On the other hand it is said that the deed was not a conveyance of the hereditaments at all, but a conveyance only of such interest as the debtor had in them; and that it was therefore a conveyance of those hereditaments subject not only to the prior legal mortgage,

but also to the equitable mortgages, and, that that being the case, it was a conveyance only of such interest as the debtor had to convey; that the registration of the deed was of no effect as regarded those equitable mortgages, because to give any effect to it would be not merely to give the deed priority—which is what the Yorkshire Registries Act, 1884, says it shall have—but to make it mean and include something which it was not intended to mean and include by the person who executed it or by the person who accepted it.

The question then really is, What is the construction of this deed? In the first place the deed is on a printed form, and it is headed “Assignment for the benefit of creditors.” That, to my mind, is not wholly immaterial, as will be presently seen. [His Lordship then stated the provisions of the deed to the effect above set forth, and continued:—] What is really the meaning of that deed? It was executed for the benefit of creditors, and it seems to me that the meaning is to vest in the trustee under it such estate of the debtor as would vest in the trustee in bankruptcy. It is really made between the debtor and his creditors. The trustee is interposed between the debtor and the creditors, and it really provides for the distribution of the debtor’s estate amongst his creditors without the necessity of resorting to bankruptcy. But it seems to me, on the whole, that to say it included something, namely, the value of a mortgagee’s security, which would not pass to the trustee in bankruptcy at all would be to give it an effect which neither of the parties to it possibly intended to give it. I think the real meaning of “all the real estate of or belonging to the debtor” is not “all the hereditaments of or to which I the debtor am seised or entitled,” but it is “all such interest as I have in the hereditaments.” It is exactly the same expression that a testator uses when he devises and bequeaths “all the real and personal estate of which I shall be possessed at the time of my death.” Nobody would suppose that that would purport to convey any more than such interest as the testator in fact had. So here it seems to me that this deed only purported to convey such interest as the debtor had, which was the interest subject to the mortgages. The Yorkshire Registries Act, 1884, may give the deed priority, but to

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WARRINGTON J. give it priority has no effect, because the deed itself does not in fact purport to postpone the mortgages to the deed.

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It seems to me, therefore, that the trustee under the deed is not entitled to the money held by the bank unless and until the claims of such of the prior equitable mortgagees as establish them have been discharged.

Solicitors: *King, Adams & Co., for S. P. Constable, Thorne; Arthur E. Burton, for Scatcherd & Co., Leeds; Miles, Hair & Co., for C. H. Heddon, Harrogate; Finnis & Chessher, for Baddiley & Co., Doncaster.*

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[1908 D. 521.]

Trustee—Improper Investment—Breach of Trust—Power to invest on Real or Leasehold Security “in his own name or under his legal control”—Under-lease—Contributory Mortgage—Reliance on Solicitor—Report of independent Valuer—Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 8—Relief under Judicial Trustees Act, 1896 (59 & 60 Vict. c. 35), s. 3.

The trustee of a will was directed to invest the trust funds “in his own name or under his legal control” in (amongst other modes of investment) freehold, copyhold, leasehold, or chattel real securities. He invested a sum of 2000*l.*, part of the trust funds, on a contributory mortgage of certain leasehold flats held under underleases at substantial rents. The security was introduced by a surveyor to the trustee’s solicitor, who recommended it to the trustee and suggested the same surveyor as a suitable person to value the property on the trustee’s behalf. The trustee appointed the surveyor and it was arranged that he should be paid a fee only in the event of the mortgage going through. The surveyor made his report, from which it appeared that the property was of a speculative character, but the surveyor nevertheless advised that it formed a good security for the sum proposed to be advanced by the trustee and his co-mortgagee. The trustee, relying on the advice of his solicitor and on the report, advanced the 2000*l.* The mortgagor subsequently became insolvent, and the trustee and his co-mortgagee were compelled to sell the property under their power of sale, with the result that the greater part of the 2000*l.* advanced by the trustee was lost. In an action against the trustee for breach of trust:—

Held, that the investment was improper and a breach of trust; that in making it the trustee, although he had acted honestly, had not acted

“reasonably,” and that he was therefore not entitled to be relieved or excused from personal liability under s. 3 of the Judicial Trustees Act, 1896. WARRING-
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WITNESS ACTION.

Edwin Benjamin Dive by his will dated July 24, 1896, devised and bequeathed all his real and personal estate to John Roebuck upon trust to sell, call in, and convert the same into money, and after payment thereof of his funeral and testamentary expenses and debts at his discretion to invest the residue of the moneys “in his name or under his legal control” in (amongst other modes of investment) “freehold, copyhold, leasehold or chattel real securities in England, Wales, or Scotland,” and to pay the income of the trust premises constituting or representing his residuary estate to his wife, Harriet Mary Dive, during her life, and after her death to stand possessed of the trust premises upon trust for all or any of the children or child of his brothers Frank Dive and Herbert Sampson Dive living at the death of his wife who being male should attain the age of twenty-one years or being female should attain that age or marry, if more than one in equal shares as tenants in common; and he appointed Roebuck and Harriet Mary Dive executor and executrix of his will.

The testator died on December 19, 1899.

The estate had been fully administered by the executors, and the residue, after payment of the testator's funeral and testamentary expenses and debts, had been retained by Roebuck as trustee.

On November 19, 1901, Roebuck advanced to one H. Johnson three sums of 600*l.*, 775*l.*, and 625*l.* (making together the sum of 2000*l.*), part of the testator's residuary estate, upon the security of three properties known as Nos. 1, 2, and 3, Stamford Brook Mansions, Hammersmith. The mortgages were contributory mortgages, further sums of 600*l.*, 775*l.*, and 625*l.* (making together another sum of 2000*l.*) having been advanced by a Mrs. Hart. The properties were leasehold buildings held under sub-leases dated respectively November 19, 1901, for a term of ninety-nine years from September 29, 1901, at annual rents of 105*l.*, 135*l.*, and 110*l.* (making together 350*l.*).

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In 1907 H. Johnson became insolvent, and Roebuck and his co-mortgagee, in exercise of their power of sale, sold the mortgaged premises to one R. Stafford Charles for the sum of 500*l*.

On March 27, 1908, Harriet Mary Dive, the tenant for life, and Eva Dive and Thomas Pelham Dive, two of the persons entitled in remainder contingently on their surviving the tenant for life, commenced the present action, claiming (*inter alia*) a declaration that the investment of the 2000*l*. was improper and a breach of trust, and that Roebuck might be ordered to make good to the estate the loss occasioned thereby.

The plaintiffs by their statement of claim alleged (*inter alia*) that no proper valuation was made of the premises prior to the advance by the defendant of the 2000*l*.

The defendant by his defence alleged that a proper valuation of the property was made by a competent auctioneer and surveyor before he made the advance; that in making it he acted honestly and reasonably; that if in making it he had been guilty of a breach of trust, he asked the Court to relieve him wholly from liability for the same; and he claimed the benefit of all statutes of limitation against the plaintiffs' claim.

At the trial before Warrington J. the following facts were proved:—That the security was introduced by R. Stafford Charles, a surveyor, to T. H. E. Foord, the defendant's solicitor; that Foord recommended the investment to the defendant and acted throughout as his solicitor in the matter; that the defendant appointed Charles to value the property on his behalf on the suggestion of Foord; that he relied entirely on Foord's advice in making the investment; that Charles made a report in which he valued the property at 6045*l*. and advised that it formed a good security for 4000*l*. Foord admitted in his evidence that the fact that the 2000*l*. was being lent by the defendant on contributory mortgage was not present to his mind when he advised the investment.

It was admitted that the defendant in making the investment had acted honestly, and the only question calling for a report was whether under the circumstances of the case he had also acted reasonably so as to entitle him to be excused for the

breach of trust under s. 3 of the Judicial Trustees Act, 1896. (1) WARRINGTON J.

The facts relating to the investment are fully stated in the judgment of Warrington J.

Cave, K.C., and *Percy Wheeler*, for the plaintiffs. In exercising the power given by s. 3 of the Judicial Trustees Act, 1896, to relieve a trustee from personal liability for breach of trust the Court must be satisfied by sufficient evidence that the trustee has acted reasonably as well as honestly: *In re Turner*. (2) The investment in the present case is entirely outside the investment clause in the will, and the defendant ought not therefore to be excused: *Chapman v. Browne*. (3) The onus is on the defendant to shew that he has acted reasonably.

Rowden, K.C., and *Eustace Smith*, for the defendant. We admit that the investment was a breach of trust, but we say that the defendant in making it acted honestly and reasonably and ought therefore to be relieved from personal liability for it under s. 3 of the Judicial Trustees Act, 1896. That section is meant to be acted on freely and fairly in the exercise of judicial discretion: *In re Turner* (4), approved by Stirling J. in *In re Stuart*. (5)

The construction of the investment clause in the will was a question of law upon which the defendant was entitled to trust his solicitor, and there is no case which binds the Court to hold that in trusting his solicitor on such a matter the defendant was not acting honestly and reasonably within s. 3 of the Act. The solicitor admitted in his evidence that the fact that the investment was on contributory mortgage was not present to his mind when he advised the defendant to make the investment. In

(1) Judicial Trustees Act, 1896 (59 & 60 Vict. c. 35), s. 3:

“(1.) If it appears to the Court that a trustee, whether appointed under this Act or not, is or may be personally liable for any breach of trust, whether the transaction alleged to be a breach of trust occurred before or after the passing of this Act, but has acted honestly and reasonably, and ought fairly to be excused for

the breach of trust and for omitting to obtain the directions of the Court in the matter in which he committed such breach, then the Court may relieve the trustee either wholly or partly from personal liability for the same.”

(2) [1897] 1 Ch. 536.

(3) [1902] 1 Ch. 785.

(4) [1897] 1 Ch. 542.

(5) [1897] 2 Ch. 583, 590.

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WARRINGTON J. investing on contributory mortgages the defendant merely made a legal mistake. The principle of *Perrins v. Bellamy* (1) applies. There, as here, the trustees made a legal mistake. They erroneously assumed that they had a power to sell the settled leaseholds and trusted their solicitor in the matter, and Kekewich J. held that they ought to be excused. That case was confirmed by the Court of Appeal (2), Lindley M.R. observing in the course of his judgment "that it was a most judicious breach of trust." [On this point they also referred to *In re Lord De Clifford's Estate*. (3)]

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Further, in making the advance the defendant acted upon the report of an independent and competent surveyor. The reasonableness contemplated by s. 3 of the Act of 1896 is the reasonableness in appointing an agent. What more could the defendant have done than he did? He employed a surveyor of good repute.

[WARRINGTON J. Who introduced the security. That circumstance suggests that the surveyor would get something out of it if the matter went through. Ought that not to have raised the defendant's suspicions?]

What the defendant had to consider was whether he would obtain a fair and independent report. The question for the purposes of s. 3 of the Act of 1896 is whether the defendant reasonably believed that the surveyor was an independent and competent man. In his report the surveyor valued the property at 6045*l.* and definitely advised the proposed advance of 4000*l.* by the co-mortgagees. The amount advanced was just under the two-thirds of the value required by the Trustee Act, 1893, s. 8, sub-s.1.

[WARRINGTON J. Suppose I had here to apply s. 9 of the Trustee Act, 1893, could I say that the defendant was right in advancing two-thirds of the value on property of this class? Surveyors appear to have got a mistaken notion that they can always advise an advance of two-thirds of the value whatever may be the nature of the property.]

There are two important particulars in which the present case differs from *In re Stuart*. (4) Here the report states the value of

(1) [1898] 2 Ch. 521.

(3) [1900] 2 Ch. 707.

(2) [1899] 1 Ch. 797, 801.

(4) [1897] 2 Ch. 583.

the property and advises the advance. In *In re Turner* (1) the investment was of a very much more unsatisfactory nature than the investment here.

[WARRINGTON J. *Chapman v. Browne* (2) was a rather special case. The trustees there took no legal advice and the investment consisted of a transfer of a third sub-mortgage.]

There is a minor point as to whether the defendant was justified in lending on the security of an underlease. The investment clause authorizes an investment on leaseholds, but imposes no limitation as to the length of the term to be accepted.

[*Cave, K.C.* In *Lewin on Trusts*, 11th ed. p. 377, it is laid down that the onus would lie very heavily upon a trustee to make out the perfect propriety of an investment on leaseholds of short duration.]

It is submitted that a power to lend on leaseholds extends to lending on an underlease where there is no other property comprised in the head lease. It would, of course, be wrong for a trustee to lend on an underlease if there were any risk of forfeiture by reason of other property in the head lease being in other hands.

Cave, K.C., in reply.

[WARRINGTON J. What I have to consider is whether the defendant personally acted reasonably in taking advice and in acting upon such advice and ought to be excused.]

There is no case in which a trustee has been excused for lending the trust fund on an insufficient security. A contributory mortgage was not only an unwise thing for the defendant to lend trust money upon, but it was outside the express terms of the investment clause in the will, and this was a matter which the trustee might have decided for himself. The investment was not "in his name or under his legal control" and was therefore a breach of trust: *In re Massingberd's Settlement* (3); *Webb v. Jonas*. (4)

[WARRINGTON J. Those cases have nothing to do with the Judicial Trustees Act, 1896.]

(1) [1897] 1 Ch. 536.

(2) [1902] 1 Ch. 785.

(3) (1890) 63 L. T. 296.

(4) (1888) 39 Ch. D. 660.

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That is so. The question as to whether the proposed security was a proper one or not was a question to be decided not by a reference to Lewin on Trusts, but by looking at the terms of the investment clause in the will. *Davis v. Hutchings* (1) shews that a trustee will not be excused merely because he acts on the advice of his solicitor, if that advice should subsequently prove to be wrong.

[WARRINGTON J. referred to *Chapman v. Browne*. (2)]

In that case the trustees were not excused.

Further, there is no case in which it has been held that a power to invest on leaseholds includes a power to invest on a mortgage of an underlease. The only cases in which a question of that kind has arisen have been vendor and purchaser cases, and there it has been held that upon a sale of a lease the purchaser is not bound to accept an underlease: *In re Beyfus and Masters's Contract* (3); and that rule ought to be applied in the present case. An underlease is subject to the double contingency of a re-entry for breach of the covenants in the head lease and also for breach of the covenants in the underlease. In the present case the surveyor valued the property on the assumption that there were no unusual covenants in the underleases and did not ask to look at the underleases.

On the point as to the advance being on contributory mortgage, s. 8 of the Trustee Act, 1893, has not been satisfied because the surveyor in his report did not advise an advance of 2000*l.* on a moiety of the underleases. That section throws upon the trustee the onus of satisfying the Court that the surveyor or valuer on whose report he acted was in fact instructed and employed independently of any owner of the property: *In re Somerset*. (4) The defendant ought therefore to have exercised his own judgment in the choice of a surveyor, and not to have accepted the suggestion of his solicitor to appoint Charles, who was interested in the mortgage going through: *Fry v. Tapson* (5); *Smith v. Stoneham*. (6) No wise man would have lent money on the faith of this report. The leases were new underleases dated

(1) [1907] 1 Ch. 356.

(2) [1902] 1 Ch. 785, 805.

(3) (1888) 39 Ch. D. 110.

(4) [1894] 1 Ch. 231.

(5) (1884) 28 Ch. D. 268.

(6) [1886] W. N. 178.

the same day as the mortgages and were subject to a heavy aggregate annual rent of 350*l.* The investment was in effect a lending of money on the security of a business. The letting of flats is a business: *Rogers v. Hosegood*. (1) It was therefore a mortgage on trade premises, and as such was an improper security: *Learoyd v. Whiteley*. (2) An unfinished house, as was the case here, is not a proper trust security: *In re Walker*. (3) The security taken by the defendant, therefore, was from every point of view an improper trust security. There is no evidence here that the loss occasioned to the trust estate was due to any general depreciation of the property in the neighbourhood.

[WARRINGTON J. What do you say as to the defence of the Statute of Limitations as regards the claim of the tenant for life?]

We admit that we cannot get over that. No doubt, if the defendant replaces the money lost in full, he will be entitled to the income of it during the life of the tenant for life.

Rowden, K.C., replied on the cases.

WARRINGTON J. This is an action brought by the tenant for life and some of the remaindermen under the will of Edwin Benjamin Dive with the object of making the defendant, who is the sole trustee, liable for the loss occasioned in consequence of the investment by him on contributory mortgages of a sum of 2000*l.* forming part of the trust estate.

The mortgages were all made on November 19, 1901, and the amount invested on behalf of the trust estate was 2000*l.*, another 2000*l.* being invested by a Mrs. Hart, making 4000*l.* in all. In 1907 the co-mortgagees, after making every possible effort to realize their security, were compelled to dispose of it for 500*l.*, with conditions attaching to the sale which materially reduced the amount of the purchase-money, with the result that the 2000*l.* belonging to the trust estate has been reduced to something between 100*l.* and 200*l.*

Two defences are raised on behalf of the trustee. The first is the Statute of Limitations and s. 8 of the Trustee Act, 1893,

(1) [1900] 2 Ch. 388.

(2) (1887) 12 App. Cas. 727.

(3) (1890) 59 L. J. (Ch.) 386, 391.

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and the other is founded on s. 3 of the Judicial Trustees Act, 1896. I will deal at once with the plea of the Statute of Limitations. The investment was made on or about the date of the mortgages, namely, November 19, 1901; the writ in the action was issued on March 27, 1908, that is, more than six years after the investment complained of. There is no question practically that the Statute of Limitations is, under those circumstances, a defence on which the trustee is entitled to rely, but it is a defence only as regards the claim of the tenant for life; the persons entitled in remainder are not yet in possession, and the statute is not a defence as against them. The result is that, if the persons entitled in remainder are otherwise entitled to have the trust fund replaced by the trustee, then, according to *In re Somerset* (1), the trustee on paying the money to make good that fund will be entitled to receive the income of it during the life of the tenant for life.

I now come to the real substantial defence so far as the claim of the remaindermen to have the fund made good is concerned—I mean the defence founded on s. 3 of the Judicial Trustees Act, 1896. That section provides: [His Lordship read sub-s. 1 of that section and continued:—] In this case the trustee acted honestly, and the only question is whether he has acted “reasonably and ought fairly to be excused” for the breach of trust. I say nothing about the condition “for omitting to obtain the directions of the Court,” because that really does not affect the question.

Now the facts are these. The testator Edwin Benjamin Dive died on December 19, 1899. He appointed his wife, Harriet Mary Dive, and the defendant executors of his will, but the defendant was the sole trustee. The estate was duly administered by the executors, and the ultimate balance was placed in the possession of the defendant as trustee. His duty as trustee was to invest the residue of the moneys constituting the estate “in his name or under his legal control” in, amongst other things, “freehold, copyhold, leasehold, or chattel real securities in England, Wales, or Scotland” and on certain other securities, and then to pay the income of the money so invested to Harriet

(1) [1894] 1 Ch. 231.

Mary Dive during her life, and after her death to hold the trust fund in trust for certain nephews and nieces of the testator mentioned in the will, of whom the other plaintiffs are two. His duty as to investment, therefore, was to invest the residue of the moneys "in his name or under his legal control." Those words are important.

On September 9, 1901, the trustee had in his hands a sum of 2000*l.* forming part of the trust estate awaiting investment. He employed Thomas H. E. Foord as his solicitor in the execution of the trusts of the will, who for twenty years had acted as his solicitor in various matters in which he required legal advice, and had also acted as solicitor for the testator. On or about September 11, 1901, Foord received a communication from R. Stafford Charles, a surveyor, the effect of which was to introduce to Foord certain property as security for any money which Foord's clients might have for investment. On September 12, 1901, Charles sent Foord the particulars relating to this property, which consisted of three blocks of small flats in Goldhawk Road, Hammersmith. In sending these particulars Charles wrote: "As I am quite disinterested in the transaction and should receive no other fee from the owner in connection with the loan I should be at liberty to act for your client in the valuation. The proposed borrower is Mr. H. Johnson, of Park Avenue, Wood Green (builder)." After some further correspondence with regard to the surveyor's fees, the result of which is to shew that Charles was not to receive a fee if the mortgage did not go through, he was instructed by Foord to report on the property. So far as the trustee himself is concerned, his account of the employment of Charles is that he was told by Foord that Charles had introduced the property, that it was suggested to him by Foord that Charles would be a proper person to make the valuation, that Charles had already acted once for the trustee in reference to property introduced by Charles to Foord, but that the matter had not gone through, and that he had been employed by Foord. The trustee accepted Foord's suggestion that Charles should act, and in consequence instructions were given by Foord to Charles to report on the property in a letter dated October 10, 1901. They were, so far as material, as follows ;

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"My clients Mrs. M. O. Hart and Mr. John Roebuck have been asked to lend the sum of 4000*l.* upon the security of three blocks of buildings known as 'Stamford Brook Mansions,' Goldhawk Road, Hammersmith, and I am authorized to ask you to advise them as to value. Mrs. Hart will lend 2000*l.* of her own money and Mr. Roebuck will lend 2000*l.* part of a trust fund." Then he repeats in the instructions certain information which he had obtained from Charles as to the mode in which the premises were held and as to the rentals produced from existing tenancies. He then says, "I am also informed that the premises have not yet been assessed for rates but that 25 per cent. on the rentals may be taken to cover all outgoings apart from ground rent." That information also he had obtained from Charles. He concludes, "I shall be glad if you will visit the premises and advise my clients whether they afford a good and sufficient security for the amount required but this is subject to an arrangement as to your fees—we could perhaps agree these to-morrow." The fees were arranged and the matter went through.

In pursuance of those instructions Charles made his report on October 23, 1901. It is headed "Stamford Brook Mansions," and so far as material is as follows: "Agreeably with your instructions I have inspected the above property offered as security for a loan and beg to report as follows: The property consists of a block of residential flats situate in the main Goldhawk Road, Chiswick, S.W." He then gives the frontages and says that the flats are within a short distance of several stations and within easy reach by means of the electric trams. Then he goes on, "The premises are arranged as three blocks of flats having attractive elevation and are substantially built of red brick with stone dressings and slated and tiled roofs and fireproof floors and having separate entrances. The two end blocks each consist of ground floor and two floors over and the centre block has ground floor and three floors over and there are in all twenty suites of flats each having the following accommodation, viz.:—Hall, dining-room, drawing-room, two bedrooms, bath-room, w.c., kitchen. . . . I am informed that all the flats with the exception of three are let on three years' agreements and I set out below

the schedule of the rentals as supplied to me.” Then he gives a list of seventeen lettings at certain rentals and the estimated rentals of three flats unlet. It is observable that he expresses no opinion himself in that report as to the terms of the three years’ agreements, even if he had seen them, or as to whether the rentals are high or low, or (except as regards one point which I will mention) likely to be increased. He then goes on to say (and this is the passage to which I refer), “It is possible that, as time goes on, the rentals in block 1 which is next to the railway may not be quite maintained, but on the other hand I consider that on the expiration of the present tenancies the rentals at present obtained in the other two blocks are capable of more than a corresponding improvement. I understand that the landlord pays rates, taxes, insurance, and repairs.” Landlord there means not the superior landlord, because these were only underleases, but the person from whom the trustee was about to take the mortgages, and therefore might include in certain eventualities the mortgagee himself. Then he says, “I am informed that the premises are held under lease for a term of ninety-nine years from the 29th September, 1901, at a rental of 350*l.* per annum.” There is, therefore, a very substantial rent which, again in certain eventualities, the mortgagee might himself be called upon to pay in order to preserve his security. He continues: “I have not seen the lease” (in fact the underleases were not granted until afterwards), “but I assume that there are no unusual covenants. The outgoings taken on the basis of those paid on a similar class of flats are estimated as under :

| | |
|---|---------------|
| Ground rent | 350 <i>l.</i> |
| Rates, taxes, water rate, gas and insurance | 260 <i>l.</i> |
| Caretaker | 52 <i>l.</i> |
| | <hr/> |
| | 662 <i>l.</i> |
| | <hr/> |

“The total rental is 1130*l.* per annum and after making the deduction for outgoings as above there would be a net rental of 468*l.* per annum but in addition to these outgoings some allowance would be necessary for repairs and contingencies and I have allowed for them in my valuation. I estimate the

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value of the premises at the sum of six thousand and forty-five pounds (6045*l.*) and I consider that they form good security for a loan of four thousand pounds (4000*l.*) and I advise that amount."

I think any one reading that report would come to the conclusion that the surveyor had formed his estimate of value on the amount of the rentals then received or estimated as compared with the outgoings. The report does not convey to the mind that the surveyor had made any valuation or formed any independent idea of the value of the thing itself, irrespective of the rents, or had even considered whether the rents which were being received were of such an amount as that a fair estimate of value could be based upon them. It raises certain suspicions in one's mind having regard to the form in which the valuation is made. The trustee says that he received that report and considered it; that he observed the note in it in reference to unusual covenants; that he made no inquiry, but left the matter entirely to his solicitor, Foord. He also says that he knew that the landlord had to pay the rates and taxes and that the road in front of the flats was not made up, but that he knew nothing about the assessment of similar buildings in the neighbourhood or the amount of rates.

On that report the trustee determined to make the advance. At that time neither the trustee nor Foord knew, although before the advance Foord did, what was the real nature of the security on which the trustee was to make the advance. The security really was on underleases. There were three underleases, one for each block of flats, for ninety-nine years from September 29, 1901, at separate rents. The underleases contained a number of covenants on the part of the lessee, some of them being ordinary, others unusual, one being not to assign the demised premises without the previous written consent of the lessor, and another being not without the previous consents of the lessor and the superior lessors (the Ecclesiastical Commissioners) to convert or to use or permit the demised premises or any part thereof to be converted or used for any purpose other than those of private residential flats. They also contained a provision giving the superior lessors power, without any

consent from or making any compensation to the lessee, to deal as they might think fit with any of the lands and premises adjoining or opposite or near the premises demised, and to erect on such neighbouring lands any other buildings, notwithstanding that the same might affect or diminish the light or air to be enjoyed by the lessee or occupiers of the premises demised. That particular provision was brought to the attention of Charles after his report had been made, but he said that he thought that that provision did not affect his valuation.

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The mortgages were all made on November 19, 1901, and were what a lawyer knows as contributory mortgages. The property was conveyed to the two mortgagees, that is to say, to Mrs. Hart, who contributed 2000*l.*, and the trustee, who contributed 2000*l.*, jointly. There were three separate mortgages of three underleases. The mortgages contained separate covenants by the mortgagor for the payment of the shares of the money advanced by each of the mortgagees. The proviso for redemption in the mortgages was on payment to them, or the survivor of them, or the executors or administrators of such survivor, and provision was made that the power of sale should be exercisable by the survivor, or the executors or administrators of the survivor, but the other contributing mortgagee was to have the means of controlling the exercise of the power of sale. The mortgages were executed and the money to be secured by them was paid at or about the date of the mortgages.

On March 19, 1907, the money and interest secured on the mortgages became unpaid. The mortgagor suspended payment or became bankrupt, and practically the whole of the 2000*l.* (with the exception of a sum of between 150*l.* and 200*l.*) with interest has been lost.

On those facts I have to determine, first, whether the mortgages were a breach of trust, and, secondly, if they were, whether the trustee ought to be excused under s. 3 of the Judicial Trustees Act, 1896. That they were undoubtedly a breach of trust is, I think, clear. The trustee's power was to invest the trust fund "in his own name or under his legal control." He departed from that by investing on contributory mortgages which were not in

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his own name or under his legal control, but in the names of himself and another person having rights co-extensive with his own in reference to the property. As to that there was no dispute in law. That was determined in *In re Massingberd's Settlement* (1) and *Webb v. Jonas*. (2) The trustee in this case, therefore, is not protected by s. 8 or s. 9 of the Trustee Act, 1893, because the breach of trust did not consist only of advancing more than the proper proportion of the value of the property.

Being a breach of trust, can I say that the trustee has acted reasonably and ought to be excused? As to the question of the mortgages being contributory mortgages, the trustee contends that he acted on the advice of his own solicitor, and the solicitor quite frankly admits that the objection to the mortgages being contributory mortgages was not present to his mind. To what extent the trustee might be said to have acted reasonably if he had consulted a solicitor on a question which depended on the rule or practice upon which the Court acts, and ought thus to be excused, I express no opinion. But that is not the present case. This is a case in which an ordinary man of business, if he had read the terms of his trust and if he had paid attention to the terms of the security he was taking, must have seen that the security was not a security in his name or under his control. The advice, in fact, given by the solicitor was not as to the practice of the Court or as to any rule by which the Court is guided in determining the relation of trustee and cestui que trust, but upon the plain words of the authority on which the trustee was entitled to act in regard to the security which he was about to take. If I were to excuse the trustee in this case on the ground that he had acted reasonably, I fail to see any case in which a trustee would not be entitled to be excused where he had invested the trust property outside the trust. Although, no doubt, it seems hard to hold a trustee liable where he has followed the advice of his solicitor, I do not think I can allow the trustee to be excused where, if he had with reasonable care considered the authority under which he was acting, he would have found that it did not authorize that which he was doing.

(1) 63 L. T. 296.

(2) 39 Ch. D. 660.

Even if I am wrong on this point, can I hold, on the facts, that he acted reasonably in investing, I will not say so large a sum as 2000*l.*, but in investing at all, on such a security, and in going into the matter in the way in which he did? In the first place these were newly-erected flats, and the mortgagor was the builder, which is not altogether immaterial. The security had been introduced by Charles, a surveyor whom the trustee employed to value on his behalf. Surely the fact that the surveyor introduced the security would have led one to suppose that he had some interest, at any rate, in getting the mortgage through; and in fact he had, because the payment of his fee for his valuation depended on whether the mortgage went through or not. That ought to have aroused the trustee's suspicions. With a whole range of surveyors to choose from, he chose as a person to value on his behalf the man who had introduced the security, which seems to me to have been most imprudent. Then the report itself is, I think, one which would make an ordinary prudent man of business, who was acting on his own behalf, hesitate before he went into such a transaction. The surveyor who made the report said that he had not seen the underleases, and he therefore did not know what their provisions were. He did not know whether there were any unusual covenants. He also said he thought it was possible that the rents then obtained for one set of flats might not be maintained in the future, but that the deficiency might be made up by rents of the other two. There, again, would not an ordinary man of business who did not want to speculate, but who wanted to get, as a trustee ought to get, a perfectly safe security for his money, if he were acting reasonably, hesitate to take a security the value of which, to some extent at all events, was a possible increase of rents in the future? He knew that these were underleases. It does not come to very much, but he was told that there was a third person behind, who, if the rents were not paid or if the covenants in the head lease were not performed, might re-enter and put an end to the underleases which formed the whole of the mortgage security. Then, again, he was told by the report that the annual rent was a substantial sum of 350*l.*, much more than the interest on the money he was going to

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advance, and that he might therefore, if the mortgagor failed to pay, have to find, in order to save the property, the 350*l.* per annum, if the mortgagor ceased to pay the rent and if the rents from these flats did not come in. I need not say any more. Although one cannot help feeling some sympathy with a trustee who has, no doubt, acted honestly, and has acted under the advice of the agent he has employed, I cannot possibly come to the conclusion that he ought to be excused for this breach of trust on the ground that he has acted reasonably in the matter. I think he has not acted as he or any other ordinary man of business would have acted in his own affairs if he had been seeking, not a speculative investment, but a secure investment for his money. That being so, on the authorities I cannot come to the conclusion that he has brought himself within the meaning of the Act, and I must hold, therefore, that he is liable to make good to the trust estate, for the benefit of those entitled in remainder, the amount of this loss.

Solicitors: *Ikin & Crowther ; Upton & Britton.*

W. I. C.

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Will—Construction—General Legacy—Gift of Shares—Change in Value of Shares—Will speaking from Death—Contrary Intention—Wills Act, 1837 (1 Vict. c. 26), s. 24.

By his will the testator gave twenty-five shares in a company to W. At the date of the will these shares were of the value of 50*l.* each with 5*l.* credited as paid up. After the date of the will the shares were divided into 10*l.* shares with 1*l.* paid up and remained in that form at the testator's death. After the date of his will he sold several 50*l.* shares and, subsequently, several 10*l.* shares. On a summons to ascertain whether the legacy was a gift of shares as they existed at the date of the will or at the date of the testator's death:—

Held, that this was a general legacy in language appropriate to describe the state of things which existed at the death and did not shew a contrary intention within s. 24 of the Wills Act, 1837, and therefore that W. only took 10*l.* shares as they existed at the death.

In re Portal and Lamb, (1885) 30 Ch. D. 50, explained.

At the date of his will, July 12, 1904, the testator W. Gillins held 360 ordinary shares in the Commercial Union Assurance Company, Limited, of 50*l.* each, upon each of which 5*l.* was credited as paid up. By his will he made a series of bequests of varying numbers of these shares to different persons, fifty shares to one and ten shares to another, and so on, merely saying "I give to" A. B. so many shares in the company. Amongst these legacies he gave twenty-five shares to W. F. Ware. In this way he bequeathed 275 shares out of the 360, and he appointed Mr. Ware and the plaintiff William Inglis his executors and trustees. After the date of his will and before February, 1907, the testator sold ten of his shares.

At extraordinary general meetings of the company held on February 25, 1907, and March 12, 1907, resolutions were passed and confirmed that each of the shares of 50*l.* each should be divided into five shares of 10*l.* each with 1*l.* per share paid up thereon. The current market value of each 50*l.* share at the

WARRINGTON J. date of the will was about 58*l.*, and the value of each 10*l.* share at the date of the testator's death was about 16*l.* 10*s.* After the conversion of the shares the testator sold 100 of his 10*l.* shares to a purchaser, and the remaining 1650 shares were standing in his name at the date of his death in February, 1908.

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This was a summons to determine whether the legacies of shares in the Commercial Union Assurance Company, Limited, were legacies of shares as they existed at the date of the will of Mr. Gillins or as they were at the date of his death; and whether in the former case the alteration of the shares had the effect of either adeeming the legacies or of entitling the legatees to any other number of shares than the number expressed in the will to be bequeathed.

Begg, for the summons.

Rowden, K.C., and *Percy Wheeler*, for Ware. We claim twenty-five shares of the value which they possessed at the date of the will, namely, 50*l.* each. By s. 24 of the Wills Act, 1837, "Every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will," but that section does not apply as between specific and residuary legatees: *In re Portal and Lamb*. (1) We do not contend that this is a specific bequest, for the testator does not even speak of them as "my" shares, but that case shews that the section must not be used to disappoint his intention. If he had used the word "my" we should have been entitled to 50*l.* shares: *Oakes v. Oakes* (2), approved in *In re Slater* (3); for these shares have been changed in name or form only and are substantially the same things as at the date of the will.

[WARRINGTON J. referred to *Macdonald v. Irvine*. (4)]

The same rule applies to general as to specific legacies. "When there is a puzzle as to which clause of the will carries a particular property, the statute does not say which clause is to outweigh the other, but only that the property is to be comprised

(1) 30 Ch. D. 50.

(2) (1852) 9 Hare, 666.

(3) [1907] 1 Ch. 665, 671.

(4) (1878) 8 Ch. D. 101.

in the will": per Lindley L.J. in *In re Portal and Lamb*. (1) The question is whether a contrary intention appears by the will.

This is a question of construction, and we are entitled to such a sum as at the death of the testator would be the value of twenty-five shares of 50*l.* each in this company: *In re Gray*. (2) When the testator gave twenty-five shares in this company he had something present in his mind of a certain value, and it was a direction to his executors to make a gift of that value. There is no difficulty in ascertaining the value in this case, though the subject of a gift may sometimes be so changed that it becomes impossible to ascertain of what it consists. That was the reason why the legacy in *In re Gray* (2) failed. On the construction of the will the testator has shewn an intention that this gift should not speak from his death.

T. H. Carson, K.C., and *A. Beddall*, for the residuary legatees. This is a general, not a specific, bequest, and under s. 24 it must be treated as referring to the state of things which existed at the death of the testator. The section has no reference to the objects of the testator's bounty; it relates to his property only. Here the whole of the testator's property was comprised in the will, and the whole will speaks from the death of the testator unless a contrary intention appears in the will itself. The question is what was comprised in the will at the date of the death. The Court cannot go behind that and inquire into the surrounding circumstances at the date of the will. The executors find that the testator at his death had shares in this company and *prima facie* they satisfy this legacy by handing over twenty-five shares as they then existed. A contrary intention must be clearly shewn in the will itself: *Boyes v. Cook* (3), overruling *In re Ruding's Settlement*. (4) In *In re Gray* (2) there were no shares comprised in the will. Even the use of the word "my" does not always shew a contrary intention: *Goodlad v. Burnett*. (5) That case also shews that the testator is presumed to have known the operation of s. 24. Mr. Gillins certainly knew of the alteration of the shares, for he sold some after that

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(1) 30 Ch. D. 50, 55.

(3) (1880) 14 Ch. D. 53.

(2) (1887) 36 Ch. D. 205.

(4) (1872) L. R. 14 Eq. 266.

(5) (1855) 1 K. & J. 341.

WARRINGTON J. had happened, and if Mr. Ware's contention is right he would have altered his will.

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The decision in *In re Portal and Lamb* (1) must be read as a whole. We rely on the judgment of Cotton L.J., that the real question was (bearing in mind the effect of s. 24) what did the description of the property apply to. The section does not interfere with the construction of the will. *Oakes v. Oakes* (2) has been overruled by *Morrice v. Aylmer*. (3)

Rowden, K.C., in reply.

WARRINGTON J. stated the facts and continued:—Now what are the legatees to have? Are they to have so many shares as they exist now, or are they to have five times that number, namely, the equivalent of each 50*l.* share as it was at the time when the testator made his will? The first question to consider is, Are these legacies of shares specific or general legacies? As to that I think there can be no doubt. A gift of so much stock, a gift of so many bonds, a gift of so many shares, have in several cases been held to be general legacies and not specific. As to stock, that is well known. So many bonds is the case of *Macdonald v. Irvine* (4), so many shares is the case of *In re Gray*. (5) The legacies, therefore, are not specific legacies, but general, and if the testator had not been possessed of any shares in the Commercial Union Assurance Company there would, I think, be no doubt that it would have been the duty of the executors to buy so many shares as they found them at the date of the testator's death, there being shares which could be bought satisfying the words of the testator's will. In saying that I do not think I am saying anything which conflicts with the judgment of Kay J. in *In re Gray* (5), because in that case the shares which were bequeathed had ceased to exist altogether.

The next thing to consider is, What is the proper way of reading the testator's will in reference to the description of that which he has thus bequeathed? That depends on the proper

(1) 30 Ch. D. 50, 52.

(2) 9 Hare, 666.

(3) (1875) L. R. 7 H. L. 717.

(4) 8 Ch. D. 101.

(5) 36 Ch. D. 205.

application of s. 24 of the Wills Act to this case. Sect. 24 provides that "Every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will." It is contended on behalf of the residuary legatees that the shares of which the testator was possessed in the Commercial Union Assurance Company were personal estate comprised in the will, and that you must therefore read the will, in reference to those shares, as if it had been executed immediately before his death. So reading the will, a gift of twenty-five shares in the company would clearly be a gift of twenty-five 10*l.* shares with 1*l.* paid, namely, the shares as they existed at the date of the death; and the residuary legatees accordingly say that that is the proper construction to be placed upon this gift. Against that the specific legatees say, If you are doing that you are making use of s. 24 in such a way as to alter what one may call the relative construction of different parts of the testator's will, and that that is what Lindley L.J. in *In re Portal and Lamb* (1) has said is not to be done. The question is whether that is the true view, and whether the contention of the legatees of the shares is really supported by the judgment of Lindley L.J. I do not think it is. Before I refer to the authorities I will look at the words of the section and see how they have been interpreted in other cases. I think Mr. Carson's argument with reference to the section independently of authority is the correct one. If personal property is comprised in a will (I say personal property because we have nothing to do with realty here), then the will must speak as to that property from the death of the testator, as if it had been written immediately before his death.

Is that view consistent or inconsistent with the authorities? I think it is clearly consistent with them. The clearest case, and the one which is the best example, is *Goodlad v. Burnett*. (2) There the testatrix gave "my new Three-and-a-quarter per cent. Annuities" to a legatee, and the residue of her estate to other persons. At the date of the will she had a certain

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WARRINGTON J. sum of Consolidated Three-and-a-quarter per cent. Annuities. Between the date of the will and the date of her death she acquired a large sum, and the question was whether that bequest carried the whole, or did it only carry the sum of which she was possessed at the date of the will. Wood V.-C. came to the conclusion that it carried the whole. He says (1): "But now that the Wills Act has expressly enacted (and testators must be taken to know the Wills Act), that a will shall be construed, with reference to personal estate, to speak and to take effect as if it had been executed immediately before the testator's death, unless a contrary intention appears by the will, it requires, in a case like the present, some more specific indication of such 'contrary intention' than the mere circumstance that the testatrix has described the stock by the words 'my Three-and-a-quarter per Cents.'—words which, although a meaning could be given to them by reference to what was the state of things at the date of the will, have also a distinct meaning in reference to the state of things at the date of her death, and might have been left in the will for the very purpose of passing her property as it existed at the latter date, and because the testatrix knew, that, by the operation of the Wills Act, they would pass that property." And then on the next page he says: "I may disappoint the intention of the testatrix in this case, but in other cases the reverse might happen. It might happen that a person had left his will in a state like the present purposely, and because he believed that, by the operation of the Wills Act, the words he had used would carry the whole property he might have at his death of the kind bequeathed; and such a person would be equally disappointed that the Wills Act was not carried into effect. I am obliged, therefore, to decide that this bequest passes the whole of the Three-and-a-quarter per Cents. of which the testatrix died possessed."

Now, except that that case dealt only with the quantity and not with the quality of the subject of the bequest, it seems to me that it is exactly in point, except that the present case is rather easier than the one which was before Wood V.-C., because

(1) 1 K. & J. 348.

I have not here the words so many “ of my shares, I have only so many “ shares ”; and I really can see no distinction between the quantity and the quality of the subject of the bequest for the purpose of applying s. 24. The construction which I have stated is that which seems to be the right construction of the section by itself, and so far as authority goes, independently of *In re Portal and Lamb* (1), which I will come to directly, that construction is confirmed by authority.

Now is there anything in *In re Portal and Lamb* (1) which in any way leads to the opposite construction? *In re Portal and Lamb* (1) was a very curious case. The testator there at the date of his will was possessed of a cottage and a little land in the particular place. After the date of his will, and before his death, he bought a large house and gardens and lands adjoining in the same place. By his will he had given “ my cottage ” and “ all my land ” in the place to a specific devisee, and the question was, Did that specific devise carry with it the house and gardens and land which he had purchased since the date of his will? Of course the words “ my cottage ” and “ all my land ” in the particular place were of themselves sufficient to carry the whole—that is to say, the house and the gardens and land which he had purchased after the date of his will—because they all legally came under the description “ all my land ” in the particular place; and it was contended on the part of the specific devisee that the effect of s. 24 was that you must construe that devise without reference to the state of things at the date of the will, that you must look at the date of the death and see what then was the land in the particular place, and that all that land must pass under the specific devise. I think really that it was that argument which was intended to be negatived by the passage in Lindley L.J.’s judgment which has been so much discussed. I think he in effect said, “ You must look at the facts as they were at the date of the will notwithstanding s. 24 has said that the will taken as a whole shall be read, as to the property comprised in it, to speak from the date of the death, and, looking at those facts, I am satisfied that the words ‘ my cottage ’ and ‘ all my land ’ in such and such a place are inappropriate to

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carry the mansion-house or the larger house, whatever it was, and the garden and grounds which he had subsequently purchased." That was certainly the view taken by the other two Lords Justices, and particularly by Fry L.J., and I think that was really the view taken by Lindley L.J. After reading the section, he says (1): "That refers to the real and personal estate comprised in the will, and nothing else. It does not say that we are to construe whatever a man says in his will as if it were made on the day of his death." So far there can be no question; every lawyer would agree with that statement of the Lord Justice. He goes on to say: "Applying, then, that rule to this will, we look to see what is the real estate comprised in it? It is to be observed that the Act speaks of it—that is, the will. When there is a puzzle as to which clause of the will carries a particular property, the statute does not say which clause is to outweigh the other, but only that the property is to be comprised in the will. Be it so. The question still remains which clause carries the property, the residuary or the specific devise?" Now comes a very remarkable passage; he says: "If a testator devises all his lands in the parish of B., and then makes a residuary devise of all his other lands, the former devise"—that is the specific devise—"will carry all other land which he may subsequently acquire in that parish under s. 24 of the statute, unless there is an intention to the contrary." Pausing there for a moment, it is quite clear that in that case which the Lord Justice is putting the effect of the statute is to alter the effect of a clause of the will as against another clause from the effect which it would have had if the will had spoken from the date of the will to that which it in fact had when it was speaking from the death, because, if s. 24 had never been passed and the clause had spoken as from the date of the will, it would only have carried the land in the particular parish of which he was possessed at the date when the will was written. Lindley L.J. goes on to say: "But when we are asked to extend the words 'my cottage and land,' so as to include that which he had not got,"—and this is important because that which he had not got would have come under the first example which he had just given, but the learned Lord Justice goes on to say what he really

(1) 30 Ch. D. 55.

means—"and that which, if he had it, would not be ordinarily described by such words, I see no reason for doing anything of the kind." The Lord Justice really means, I think, that the effect of the clause is not to be any greater than that which the Act has said it shall be—that is to say, the will shall speak from the death—but if, speaking from the death, you see in it something (whether you regard it as an expression of a contrary intention or not) which renders it impossible properly to give the more extended construction to the specific devise, then you are not to give it that construction; because the Lord Justice goes on to say, "It is incredible to my mind that a man having a small cottage and land, and having contracted to buy a gentleman's house with some adjoining land to be occupied with it, would use such a description as 'my cottage' and 'all my land' if he had intended this house to pass." I have no such difficulty here. The case which I have is really the first of the two examples given by Lindley L.J., a gift of so many shares, instead of a gift of "all my land," answering a particular description. In each case I think the provisions of s. 24 make one read the will as speaking from the death; and therefore a gift of so many shares must be a gift of so many shares as they are found by the executor when he comes to administer the testamentary dispositions of his testator, and must therefore mean so many of the 10l. shares into which the capital of the Commercial Union Assurance Company is now divided.

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[1908 B. 2328.]

Solicitor—Bill of Costs—Taxation—Application to Tax within One Month after Delivery of Bill—Common Order to Tax—Submission to pay—Exclusion of Statute-barred Items—Special Order—Jurisdiction—Solicitors Act, 1843 (6 & 7 Vict. c. 73), s. 37.

Where a client applies under s. 37 of the Solicitors Act, 1843, for an order for taxation of his solicitor's bill of costs, whether within one month or after the expiration of one month after the delivery of the bill, the common order to tax, which contains a submission by the client to pay what shall be found due on taxation, is the proper order to be made, and the Court will refuse to insert therein at the instance of the client a direction to the taxing Master to disallow statute-barred items.

SUMMONS FOR TAXATION.

On May 14, 1908, Lewis James Drake Brockman, a solicitor, who had acted as solicitor and clerk to the Sandgate Urban District Council and their predecessors the Local Board of Health of the District of Sandgate, delivered to the council certain bills of fees, charges, and disbursements amounting in the aggregate to 43*l.* 10*s.* 8½*d.*

On June 12, 1908, within one month after the delivery of the bills, the council took out the present summons under the Solicitors Act, 1843, asking that it might be referred to the taxing Master to tax and settle the bills, such taxation and settling to be with the usual directions, but on the footing (*inter alia*) that all fees, charges, and disbursements (if any) which, or the remedies for the recovery of which, were barred by statute at the date on which the bills wherein they were respectively comprised were delivered should be disallowed.

The summons did not ask for delivery up of any documents, and therefore no question as to the solicitor's lien arose.

H. Terrell, K.C., and G. Solomon, for the summons. The present summons was taken out within one month after the delivery of the solicitor's bills of costs, and the applicants are therefore entitled under s. 37 of the Solicitors Act, 1843, to an

unconditional order for taxation. Where under that section an application is made within the month after the delivery of the bill the Court has no discretion in the matter; the order is an order of course, a simple order for taxation of the bill: *In re Pender*. (1) The applicants are therefore entitled to an unconditional order, and the insertion of a submission to pay makes the order conditional.

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[WARRINGTON J. An unconditional submission is to be found in all the forms of orders given in Seton on Judgments and Orders, 6th ed., vol. i., ch. 17, s. 3.]

The common order to tax is not the appropriate order in a case like the present. It is appropriate only where the application is made after the expiration of the month, in which case the section empowers the Court to impose such terms as may appear to be necessary to do justice between the parties, and it was, no doubt, the practice of the Court of Chancery and is now the practice of the Chancery Division to impose as one of such terms a submission by the client to pay what shall be found due on taxation, but that submission is dispensed with in the King's Bench Division: *Cordery on Solicitors*, 3rd ed. p. 310; *Annual Practice*, 1909, vol. ii. p. 152.

[WARRINGTON J. It appears that in *In re Bromley* (2) the Court did make a distinction between the case of an application to tax within a month and that of an application to tax after the expiration of a month from the delivery of a bill, but that was not with regard to the submission to pay, but to payment into Court.]

In order that statute-barred items should be excluded from the bill a special order on notice is necessary directing the taxing Master to exclude those items: *In re Margetts* (3); *Curwen v. Milburn*. (4) Delivery up of documents is not asked for by the present summons. Where delivery up is asked the Court, no doubt, has a discretion as to the form of order it will grant: *In re Murray* (5); *Ex parte Jarman*. (6) *In re Hughes* (7),

(1) (1846) 2 Ph. 69, 77.

(4) (1889) 42 Ch. D. 424, 435.

(2) (1844) 7 Beav. 487.

(5) [1867] W. N. 190.

(3) [1896] 2 Ch. 263, 266.

(6) (1877) 4 Ch. D. 835.

(7) [1899] W. N. 125.

WARRINGTON J. in which Kekewich J. refused to make an order excluding from the submission to pay statute-barred items, is distinguishable. It appears from the order in that case (1.) that the summons was taken out more than a month after the delivery of the bill, and (2.) that the summons also asked for delivery up of documents.

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Further, it will be a hardship on the applicants if the direction asked for is not inserted, as they will in that case lose the protection given them by the Statute of Limitations. They may, no doubt, leave the solicitor to bring his action on the bills, but they will then lose the benefit of the one-sixth rule given them by the Solicitors Act. [They also referred to *Coburn v. Colledge*. (1)]

Cave, K.C., and *F. E. Ward*, for the solicitor. The applicants cannot obtain the order to tax without submitting to pay what shall be found due on taxation: *In re Battams & Hutchinson* (2); *In re Hughes*. (3)

[They were stopped on this point.]

The question then is whether the order ought to contain the special direction asked for, and it is submitted that it ought not. No hardship will be occasioned to the applicants by excluding it. As is pointed out in a note to *In re Hirst & Capes* (4), where in an action on a solicitor's bill of costs there has been no verdict, the order is usually in the form settled in *Smith v. Edwardes* (5), which directs that the taxation shall be according to the statute; that the taxing Master in such a case, having taxed the bill, deducts or adds the costs of taxation according as one-sixth is or is not disallowed, and the allocatur is then given for the net amount, which net amount is then inserted in the judgment; but that, if the reference to the taxing Master is after verdict, the reference would be in the ordinary course of things not under the statute, and the one-sixth principle would not apply: *Lumsden v. Shipcote Land Co.* (6) If the client applies for taxation under the Solicitors Act, the question is only one of quantum. He accepts the bill and submits to pay what shall be found due.

(1) [1897] 1 Q. B. 702, 709, 710.

(2) [1897] 1 Ch. 699, 703.

(3) [1899] W. N. 125.

(4) [1908] 1 K. B. 982, 986.

(5) (1888) 22 Q. B. D. 10.

(6) [1906] 2 K. B. 433.

The Statute of Limitations is a weapon of defence and not of offence, and it is a novelty for a client to seek to set it up on an application by him to tax. There is no real hardship on a client in refusing to allow him to do so. It is open to him, instead of himself applying to tax, to leave the solicitor to sue him on the bill, in which case he can set up the statute as a defence.

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[WARRINGTON J. What is the date under the Statute of Limitations at which the statute stops running?]

The issue of a writ in an action. But a summons to tax is not an action, and the issue of it will not have the effect of stopping the statute from running. A client who of his own accord applies for an order for taxation thereby waives his right to set up the statute. There is no precedent for an order in the form asked for by the applicants, and it is submitted that their application ought to be refused.

H. Terrell, K.C., in reply.

WARRINGTON J. This is an application under the Solicitors Act, 1843, by clients to tax their solicitor's bills of costs. It is a special application, and the only questions with which the Court has to deal are as to special directions which the clients ask shall be given to the taxing Master. Certain of those directions were settled by arrangement when the matter came before me previously to the Christmas Vacation, but there remained over one point, which is the point now for decision, namely, whether on an application to tax under the Solicitors Act, 1843, the clients are entitled to have directions given to the taxing Master to disallow items barred by the Statute of Limitations.

Now the case with which I have to deal is that of an application within a month from the delivery of the bill—in which case the client's right to have the bill taxed is absolute and unconditional. It is also a case in which there is no question of the solicitor's lien, for if there were, of course the Statute of Limitations would have no application, because the solicitor would be entitled to insist on his lien in respect of items barred by the statute as well as in respect of those which were not so barred. The only question is whether in a case of

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Sect. 37 of the Solicitors Act, 1843, so far as is material for the present case, provides that no attorney or solicitor shall commence any action for the recovery of any fees, charges, or disbursements for any business done by him until the expiration of one month after he shall have delivered unto the party to be charged therewith a bill of such fees, charges, and disbursements, and that "upon the application of the party chargeable by such bill within such month it shall be lawful"—I am leaving out immaterial words—"in case the business contained in such bill . . . shall have been transacted in the High Court of Chancery, or in any other Court of Equity . . . or in case no part of such business shall have been transacted in any Court of Law or Equity, for the Lord High Chancellor or the Master of the Rolls . . . and they are hereby respectively required, to refer such bill, and the demand of such attorney or solicitor . . . thereupon, to be taxed and settled by the proper officer of the Court in which such reference shall be made, without any money being brought into Court; and the Court or judge making such reference shall restrain such attorney or solicitor . . . from commencing any action or suit touching such demand pending such reference . . ."

From the year 1843, when that Act was passed, there has been in use in the Court of Chancery, and in the Chancery Division, an order which is known as the common order to tax. The mode in which that order is obtained is that the client presents a petition in which he states that he has employed the solicitor; that the solicitor has delivered his bill; that there are items in it to which he objects; that he submits to pay what may be found due on taxation, and then prays for an order for taxation. On that the common form of order is made, and that order recites the petition, including the submission to pay; it then directs the bill to be taxed, and directs the taxing Master to certify to whom and by whom the balance is to be paid; and then it orders that the amount so certified shall be paid within twenty-one days after service of the order and of the taxing Master's certificate to be made in pursuance thereof by the party from whom to

the party to whom the sum shall be certified to be due, unless the Court shall, upon special circumstances to be certified by the taxing Master, otherwise order, upon application to be made within one week after the date of the said Master's certificate by the party liable to pay such amount. That is the common form of order which has been in use for the last sixty-six years.

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It was contended on behalf of the applicants in this case that in the case of an application for taxation within one month after the delivery of the bill that order is wrong, because it is the duty of the Court to direct unconditionally the taxation of that bill, and it was contended that the requirement of a submission in the petition and the direction to the client to pay following on such submission do not constitute an unconditional order to tax, but impose a condition.

I should have no power, even if I thought it right, to accede to that argument. The practice of the Court has been unbroken for the last sixty-six years, and it would be quite impossible for a judge of first instance to alter that practice after such a length of time. But I think the argument is founded on a misapprehension. The order is not a conditional order at all. All that the Act did was to require the judges named to refer the bill for taxation. The practice of directing taxation was in existence at the time the Act was passed, and the Act says nothing about the form of the order to tax; it only provides that the order to tax shall be made. The only change that in terms the Act imposed on the then practice of the Court was that the order should be made without requiring any payment into Court by the client—and that is most significant. The Act did effect a change in the practice of the Court in that respect, and I think the inference to be drawn is that it did not intend to effect any alteration in the practice of the Court in any other respect. But there is another reason why the order is made in the form in which it has always been made, and that is that the order contains a direction in a certain event for payment, not by the client who obtains the order, but by the solicitor; and, if the client asks for an order which may result in a direction for payment by the solicitor, it is only common justice that the client should be required to pay what should be due to the solicitor if that should be the

WARRINGTON J. result of the proceedings. It seems to me, therefore, that the argument directed to the form of the common order has no foundation, and that I must deal with this case on the footing that the common order to tax is the right order under the Solicitors Act in cases where the taxation is directed within a month after the delivery of the bill as well as in cases where it is directed after the expiration of the month. I start therefore with that.

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The next point to be noticed is that from 1843 to the present time no order, so far as can be ascertained, has ever been made such as that which I am now asked to make. There is no trace of any order in which the Court has directed the taxing Master, in a taxation of this kind, to disallow items barred by the Statute of Limitations. Further, it is well settled that under the common order to tax the taxing Master is not entitled to disallow items barred by the Statute of Limitations, and, therefore, parties desiring to raise the statute know that under the common order to tax they will not be able to do so. Although, as I have said, there is no order to be found in which a direction has been given to the taxing Master to disallow statute-barred items, the point has been mooted, and on two occasions learned judges have, I will not say expressed opinions, but have said something on that subject. The first occasion was in *Curwen v. Milburn* (1), which came first before North J. and afterwards before the Court of Appeal. That was a case of a solicitor's lien, and to that case, of course, the Statute of Limitations had no application for the reason I have already stated, that the solicitor is entitled to insist on his lien whether the items are barred by the Statute of Limitations or not. But North J. did say this (2): "I should not like to decide without further consideration the question whether, under the common order for taxation, the taxing Master would properly disallow, without taxing them, all statute-barred items. The question does not really arise here, for it is clear that the parties intended there should be a taxation for the purpose of determining what the amount of the solicitor's lien was." The point thus mooted by North J. was disposed of by Kekewich J. in a subsequent case to which I shall presently

(1) 42 Ch. D. 424.

(2) 42 Ch. D. 432.

refer. In the Court of Appeal Cotton L.J. says (1), "I give no opinion whether the defendant" (the solicitor) "has a right of action for the disputed items"—that is for the items barred by the Statute of Limitations—"I go on the ground that the scope of the order is to ascertain the amount of costs for which the defendant has a lien"; and Fry L.J. says (1), "To support the plaintiff's case the order ought to have directed two certificates, one of the amount for which the plaintiff was personally liable, and the other of the amount for which he was not personally liable, but for which the defendant had a lien. I think that it is too late now for the plaintiff to make a distinction between the two amounts." Fry L.J. does not there, it will be observed, express any opinion as to whether it would be right to direct the certificates; he merely says that, in order to get what he wanted, the plaintiff ought to have had two certificates.

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The other case in which the actual point that is before me was, I will not say dealt with, but hinted at, was *In re Margetts* (2), before Kekewich J. That case decided, so far as the present point is concerned, first, that under the common order to tax—and that was the only decision—the taxing Master has no right to disallow the statute-barred items. In dealing with that point Kekewich J. says (3): "What is the right of the petitioner, the client, as between himself and the solicitor, under such an order as this? It seems to me that, taking it simply in that view, the client ought to pay all costs properly incurred. There is no injustice in that; for he will have known beforehand what business was done: he has the bills; he instructed the solicitor; he applies for and obtains the order with his eyes open, and submits to pay what is due. Under the Statute of Limitations the debt remains due, and for many purposes is described as a debt; the statute does not bar the debt, but the remedy; and it seems to me that the more convenient construction of the order is that what is found on taxation to have been properly incurred by way of costs is intended to be paid, without regard to any objection of this kind. I have before me the objections raised before the taxing Master and his replies; and I think it right

(1) 42 Ch. D. 435.

(2) [1896] 2 Ch. 263.

(3) [1896] 2 Ch. 266.

WARRINGTON J. therefore to notice briefly the reasons given by the taxing Master. [His Lordship then considered some of the reasons given by the taxing Master for taxing the statute-barred items, and continued:—] I would rather not ground my judgment upon them, but simply on this—that the client submitted to pay what should be found due on taxation; and that if she wished to raise the question of the Statute of Limitations she ought to have done so by applying for a special order.” It is on that hint of Kekewich J. that the present application is founded. It is said that Kekewich J. there expressed the opinion that the application of the statute might be brought about by a special order, not an order in the common form, but a special order giving directions to the taxing Master.

The matter came again before Kekewich J. in chambers in *In re Hughes* (1), and there is a note of the case in the *Weekly Notes* of August 5, 1899. I have to thank the reporter of that note for having furnished me with its history. Shortly it is this: The matter came before the learned judge in chambers in May of 1899, and he then, having looked into the authorities, expressed the opinion that the clients were not entitled to rely on the Statute of Limitations. He expressed his opinion in this form, that the clients were not entitled to have the submission to pay modified so as to exclude items barred by the statute. He offered to counsel who appeared before him in chambers for the clients to give him a memorandum in writing of his reasons in case the counsel desired to take the case to the Court of Appeal. Counsel did not desire to do so, and the memorandum of the judge’s reasons was, therefore, never prepared. The matter came before the learned judge again in July of that year on another part of the case, and he then in Court said what he had done and repeated the views he had expressed in chambers, and it was on that that the reporter prepared the note which appears in the *Weekly Notes*, and he did so after communicating with the learned judge in regard to the point referred to in Court as to the memorandum of his reasons. The reporter had asked the learned judge whether he had any memorandum of his reasons, and the answer he received was that he had not, because counsel had not

(1) [1899] W. N. 125.

asked for it. I only mention these facts as shewing that some trouble was taken by the reporter to ascertain what were really the views of the learned judge on this question. Accordingly this note was inserted; it is headed "Summons for Taxation" and is as follows: "This was an application for the taxation of the respondent's bill of costs, the applicants submitting to pay what should appear to be due on taxation, not including in such submission any charges or items barred by the Statutes of Limitation. . . . Kekewich J., having carefully considered the authorities, came to the conclusion that he had no right to make the order. The solicitor was entitled to an unconditional submission to pay what should appear to be due on taxation without any exception of charges or items barred by the Statutes of Limitation." That case does not directly decide the point that I have to decide for two reasons: one is that on looking at the order made in that case it appears that the application was made more than a month after the delivery of the bill, and therefore it was a case in which the Court could impose any condition it thought fit on taxation; the other reason is that on looking at the order it appears that it contained an order for delivery up of documents, and therefore involved a question of the solicitor's lien, in which case, as I have said before, the Statute of Limitations is not of importance. There is another reason too; that note is not quite satisfactory as a decision of the point, because, when one comes to think of it, the form of submission is not quite the question which has here to be determined. The question I have to determine is whether it is right to give a special direction to the taxing Master, and if the taxing Master, acting under that direction, excludes items barred by the statute, then those items are not certified by him to be due on taxation, and, therefore, the submission to pay what is found due on taxation would not involve a submission to pay those items. So that the real question is not whether the form of submission ought to be retained, as it always has been for the last sixty-six years, but whether a special direction should be given to the taxing Master to treat certain items as not due on taxation.

Now ought I to do that? Is it right on principle, and is it consistent with the authorities to which I have referred, to give

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WARRING, that direction? It was contended in the first place that if such
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BROCKMAN, not so. The client knows, as Kekewich J. pointed out in *In re*
In re. *Margetts* (1), what business has been done; he knows how long
ago the employment of the solicitor commenced; and if he desires
to plead the statute, he need not apply for the order to tax within
the month—he may leave the solicitor to bring his action for the
bill, and on the action being brought it is open to him to plead
the statute.

Then it is said that if he does that he loses the benefits which
the Solicitors Act gives him. Again I say that is not so. It is
now well settled that the practice of the Court is that, if there is
no verdict, and if the solicitor applies under Order xiv. and twelve
months have not elapsed from the delivery of the bill, then
the Court, in an action by the solicitor to recover payment of
his bill, makes an order for taxation which is in form the same
as under the Solicitors Act, in particular that it gives to the
client the benefit of what is generally referred to as the one-sixth
rule. If, on the other hand, the case has to go to trial, as it
would if the statute is pleaded and a verdict is given in
favour of the plaintiff, subject, of course, to the statute, then
the taxation is directed, not under the Solicitors Act, but under
the ordinary practice of the Court, and the client gets the
benefit, therefore, in that way of having what is properly due
found in the action, and he is not required to pay more than is
properly due. The only difference between that case and the
case of taxation before verdict is that in the case of taxation
after verdict what is called the one-sixth rule does not apply;
but the Court always has power in dealing with costs to do what
is just between the parties, and it seems to me, therefore, that
although in that case the one-sixth rule does not apply, yet no
injustice is done to the client, because the Court can always
make such order as it thinks fit with regard to the costs of the
proceedings. I think what I have said is an answer to the
client's contention that it would be a hardship upon him not to
allow the application of the statute.

(1) [1896] 2 Ch. 263, 266.

But on principle is it possible properly to allow the application of the statute in this case? The effect of the statute, as we all know, is that it prevents an action being brought. It is in terms that no action shall be brought to recover such a debt as this but within six years from the time the debt was incurred. It does not bar the right, it merely bars the remedy. As Kekewich J. pointed out in *In re Margetts* (1), though for another purpose, the debt is due notwithstanding the lapse of time. The only disability imposed on the creditor is that he is not entitled to bring an action for recovery of the debt. In the case with which I have to deal the solicitor brings no action for the recovery of his debt; he delivers a bill, and on the delivery of that bill the client takes a proceeding which results in an order, if the taxation is that way, on the client to pay the solicitor. But that order is made in the proceeding instituted by the client and not by the solicitor. Therefore the Statute of Limitations has no direct application. Nor can the statute, in my judgment, be applied by analogy. The statute does not apply, as we know, to proceedings in Courts of Equity; it is only applied by analogy in Courts of Equity to suits, and not to cases in which proceedings are instituted, not by the creditor, but by the debtor. And the point is illustrated by the difficulty, which is at once apparent, of determining, if the statute is to be applied in such cases, what is the date at which the statute shall cease to run. The theory on which the summons in the present case is issued is that the date is that of the delivery of the bill, but the delivery of the bill is not a proceeding by the solicitor. The delivery of the bill, followed by the application for taxation and the order for taxation, results in a judgment in favour of the solicitor, but it is a judgment, not in proceedings instituted by him, but in proceedings instituted by the client; and in order to treat the date of the delivery of the bill as the date at which the statute is to stop running one would have to treat the delivery of the bill by the solicitor, followed by taxation, as indirectly the institution of proceedings by the solicitor. That would be quite improper, because the delivery of the bill may not result in proceedings at all; the client may not choose to tax; the proceedings

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(1) [1896] 2 Ch. 263, 266.

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—
are commenced by the volition of the client and not by the volition of the solicitor. It seems to me, therefore, that in the case with which I have to deal, and in similar cases, there is not an action brought by the solicitor, not a suit instituted by the solicitor to which the statute in the one case could be applied directly, or in the other case could be applied by analogy.

I think, therefore, that the conclusion to which the Court ought to come is that where the client applies for taxation, whether within a month after the delivery of the bill or more than a month after the delivery of the bill, he submits to pay what is found due on taxation, and due in a proper sense, namely, not that for which an action could be brought, but that which is due whether barred by the Statute of Limitations or not; that if he wishes to raise the statute he must not himself institute proceedings for taxation, but must leave the solicitor to institute proceedings against him, which will result in taxation in the manner in which I have pointed out; and that if he takes the proceedings, then there is no room for the application of the statute. In my judgment, therefore, the order for taxation ought not to contain the special direction asked for by the applicants.

[The applicants not desiring to take an order without that special direction, no order was made on the summons except that the applicants pay the costs.]

Solicitors: *John Hands, for J. Shera Atkinson, Sandgate; White, Borrett & Co., for Brockmans, Folkestone.*

W. I. C.

In re GIBBON.MOORE *v.* GIBBON.

[1908 G. 1485.]

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Dec. 2, 3, 4, 5,
9, 11.

Administration—Intestacy—Devolution of Real and Personal Estate—Mortgage secured by a Term—Mortgage in Fee—Equities of Redemption acquired by Mortgagee subject to the Mortgages—Declaration against Merger—Charge created by Mortgagee—Death of Mortgagee intestate—Devolution of Mortgage Debts—Merger—Declarations against Dower, Effect of—Dower Act, 1833 (3 & 4 Will. 4, c. 105), s. 6.

In 1866 A. mortgaged freeholds to D. in fee. In 1867 D. charged his mortgage debt and created a term of 1000 years to secure the charge. In 1868 D. foreclosed A., and between 1870 and 1872 mortgaged the fee to G. to secure sums amounting to 5411*l.* In 1872 D. by his marriage settlement also charged the fee with 5000*l.*, which sum, in the events which happened, became held in trust for him. In 1874 D.'s equity of redemption under his mortgages of 1870 to 1872 and his interest in the 5000*l.* were conveyed to G. subject to all existing charges and with a declaration against merger. In 1900 G. took a transfer of the charge (then reduced to 9800*l.*) and term of years created by the mortgage of 1867 with a declaration against merger, and in 1902 he deposited the deeds of 1866, 1867, and 1900 with a memorandum of deposit with M. by way of equitable mortgage. On G.'s death intestate the question arose between his real and personal representatives whether the above-mentioned three charges of 9800*l.*, 5411*l.*, and 5000*l.* or any of them had merged in the fee :—

Held that, as M. was entitled under his memorandum of deposit to call for a legal mortgage of the fee and also of the term, the charge of 9800*l.* and the term securing it had not merged in the inheritance, but remained part of G.'s personal estate.

But *held*, following *Tyler v. Lake*, (1831) 4 Sim. 351, that the charges of 5411*l.* and 5000*l.* had merged in the fee, for that it would be a fraud on M. to keep them alive against him in favour of G., his mortgagor.

In 1872 A. became bankrupt. In 1873 G., under the power of sale in D.'s mortgage of 1870, sold part of the mortgaged property to H.

Upon G. becoming possessed in 1874 of D.'s equity of redemption in the mortgaged property, he took out administration to D., who had died in 1872, and as D.'s administrator sought to prove in A.'s bankruptcy for the unsecured balance of the mortgage debt under the mortgage of 1866. This involved reopening the foreclosure of 1868, and for this purpose G. obtained from H. on December 30, 1875, a reconveyance of the property sold to him in 1873. This reconveyance contained a

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declaration by G. to bar dower. Subsequently the foreclosure was reopened, and A.'s trustee in bankruptcy declined to redeem the mortgage of 1866 and conveyed the equity of redemption thereunder to G. :—

Held, that the declaration to bar dower operated to bar any right of G.'s widow to dower as regards the property comprised in the deed of December 30, 1875.

Where the owner of an equity of redemption takes a transfer of an existing mortgage with a declaration that the mortgage is kept on foot as a subsisting charge for the benefit of himself, his heirs and assigns, the mortgage will pass upon his death intestate as personal estate to his next of kin. The result is the same where in a conveyance on sale by a mortgagor and mortgagee the mortgage is conveyed separately with a declaration that the mortgage is to be deemed to be a subsisting charge as a protection to the owner of the equity of redemption, his heirs and assigns, against subsequent incumbrances, but for no other purpose.

A recital in a deed may operate as a sufficient declaration against dower under s. 6 of the Dower Act, 1833.

ORIGINATING SUMMONS.

In March, 1905, Henry Gibbon died intestate possessed of considerable real and personal estate. His next of kin were his widow and his three daughters. The three daughters were also his coheirresses-at-law. Two of the daughters were married. Letters of administration to his estate were granted to his widow and to one of the married daughters. In the administration of the estate various questions arose between the real and personal representatives of the intestate, and this summons was taken out by the daughter who was one of the administrators to determine, amongst others, the following questions :—

1. Whether the following sums secured on mortgage, or any of them, formed part of the personal estate of the intestate at the date of his death, namely, (a) 9800*l.* balance of 10,000*l.* advanced on mortgage dated September 26, 1867, and transferred to the intestate by deed dated October 22, 1900; (b) 4161*l.*, 1000*l.*, and 250*l.*, together making 5411*l.*, advanced by the intestate to one Durant on mortgages dated respectively November 23, 1871, May 1, 1872, and June 8, 1872; and (c) 5000*l.* directed to be raised by settlement, dated December 23, 1871, and made by Durant.

2. Whether in the events which happened the declaration against dower contained in an indenture dated December 30, 1875, and made between Norman Hill of the one part and the

intestate of the other part, operated to disentitle his widow to NEVILLE J. dower out of the property thereby conveyed.

3. Whether the following sums secured on mortgage formed part of the personal estate of the intestate at the date of his death, namely, (a) 5750*l.* (part of a larger sum advanced on mortgage dated September 15, 1870) transferred to the intestate by deed dated November 15, 1882; (b) 5000*l.* balance of 8000*l.* advanced on a mortgage dated June 23, 1902, and transferred to the intestate by deed dated March 25, 1905.

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4. Whether the recital with reference to dower contained in a deed dated February 14, 1876, and made between the intestate of the one part and S. A. Beaumont and another of the other part, operated as a declaration by the intestate against dower within the meaning of s. 6 of the Dower Act, 1833.

The facts relating to the first question were as follows:—

By deed dated June 13, 1866, one Austin conveyed certain freeholds to Durant in fee by way of mortgage to secure the repayment of 41,699*l.* and interest.

By deed dated September 26, 1867, Durant charged the 41,699*l.* to Scott and others with the payment of 10,000*l.* and interest, and by the same deed demised to them the mortgaged premises for a term of 1000 years to secure the repayment of the 10,000*l.* and interest.

In August, 1868, Durant, in a foreclosure action of *Durant v. Austin, Scott, and Others*, obtained a decree of foreclosure absolute against Austin in respect of the mortgage of June 13, 1866.

By deed dated November 25, 1870, Durant mortgaged (inter alia) the same premises to H. Gibbon (the intestate) to secure the repayment of the sum of 1534*l.* and interest.

By deed dated November 23, 1871, Durant mortgaged the same premises to the intestate to secure the repayment of 4161*l.* and interest. This 4161*l.* included the 1534*l.* last mentioned.

By deed dated December 23, 1871 (being his marriage settlement), Durant conveyed the same premises to trustees subject to the mortgages of September 26, 1867, and November 23, 1871 (and a mortgage of October 11, 1871, afterwards paid off), upon trust to raise the sum of 5000*l.* to be held upon trusts, in the

NEVILLE J. events which happened, to pay the income to his widow for life, and after her death to stand possessed of the 5000*l.* for his executors, administrators, and assigns.

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By deed dated May 1, 1872, Durant further charged the same premises in favour of the intestate to secure 1000*l.* and interest.

By a memorandum dated June 8, 1872, Durant further charged the same premises to the intestate to secure 250*l.* and interest.

In July, 1872, Durant died, having by his will devised and bequeathed all his real and personal estate to his wife, Sarah Durant, whom he appointed sole executrix.

By deed dated May 20, 1874, Sarah Durant for valuable consideration assigned to the intestate all her beneficial interest in the personal estate of Durant and also conveyed to him all the real estate of Durant.

On June 13, 1874, administration to the estate of Durant with his will annexed was granted to the intestate as assignee of Sarah Durant.

By deed dated June 15, 1874, Sarah Durant, G. Tunks (the trustee of the settlement of December 23, 1871), and the mother and two sisters of Durant, after reciting that no part of the sum of 5000*l.* directed to be raised by the said settlement was ever raised and reciting that Sarah Durant (the widow) had assigned the whole of the real and personal estate of Durant to the intestate and had renounced probate of his will and consented to a grant of administration to the intestate, assigned and released to the intestate all their estate right title and interest both at law and in equity under or by virtue of the said indenture of settlement or otherwise howsoever into, out of, or upon all and singular the real and personal estate comprised in the said indenture of settlement subject to the several mortgages and charges mentioned in the fourth and fifth schedules thereto. This deed contained a declaration that nothing therein contained should have any effect or operation by way of merger of the mortgages or charges existing on any premises thereby granted, assigned, or released, or granted, assigned, or released by any deed ancillary to the carrying out of the said arrangement or any of such mortgages or charges, but that all such mortgages or charges should remain and be of the same force and effect as

before the execution thereof. The fourth schedule to this deed NEVILLE J. comprised the mortgage to Scott and others dated September 26, 1867, the mortgage dated November 25, 1870, and the mortgage dated November 23, 1871. The fifth schedule to this deed comprised the mortgage dated May 1, 1872, and the memorandum of charge dated June 8, 1872.

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By deed dated October 22, 1900, the intestate paid off the sum of 9800*l.*, being the balance then due in respect of the sum of 10,000*l.* secured by the deed of September 26, 1867, and took a transfer of that security, and this transfer contained a declaration that the term of 1000 years should be kept alive and not merge or become extinct in the greater or other estate and interest of the intestate in the same premises, and that all mortgages, charges, liens, claims, and sums of money due to the intestate (including the said sum of 9800*l.* thereby assigned) should be kept on foot for his benefit as a protection against mesne incumbrances or other mortgages, charges, claims, and demands whatsoever, and that nothing therein contained should in any way prejudice his rights or claims as against any persons not parties thereto.

On May 1, 1902, the intestate deposited the deeds dated June 13, 1866, September 26, 1867, and October 22, 1900, with W. W. Moore as security for 9920*l.* together with a memorandum charging the hereditaments comprised in the said deeds with payment of the 9920*l.* and interest, and agreeing to execute a legal mortgage of the same hereditaments and premises.

A. L. Ellis, for the plaintiff.

Jenkins, K.C., and *S. Leeke*, for the widow. There is no equity between the next of kin and the coheiress-at-law of the intestate and they must take the property as they find it: *Oxenden v. Lord Compton*. (1) Where different interests in the same estate become vested in the same person the Court is guided by intention, and if that is not expressed, there is no merger in equity unless it is for the benefit of the person in whom the estate is vested: *Ingle v. Vaughan Jenkins* (2); a fortiori where there is, as here, an express declaration against merger, which is in accordance with the form in Davidson's Conveyancing, 4th ed., vol. ii., pt. 1,

(1) (1793) 2 Ves. Jun. 69.

(2) [1900] 2 Ch. 368.

NEVILLE J. pp. 324, 327. Further, the 9800*l.* is secured by a term in gross and passes to the next of kin as part of the personal estate of the intestate: *Lord Compton v. Oxenden* (1); *Belaney v. Belaney*. (2) As to the 5000*l.* and 5411*l.*, Gibbon's title to Durant's equity of redemption was as administrator of Durant and would be liable to Durant's general creditors. Therefore it was to Gibbon's interest to keep these charges alive, and they also are part of his personal estate.

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Peterson, K.C., and *Christopher James*, for the trustees of the settlements of the two married daughters. The rule as to merger is stated in *Lewin on Trusts*, 11th ed. p. 918. It was not to Gibbon's interest to keep these charges alive. As to the 9800*l.*, it was secured by a term which became attendant on and part of the inheritance, and which merged in the fee for the benefit of the heir-at-law: *Lord Compton v. Oxenden* (1); *Capel v. Girdler* (3); *Whitchurch v. Whitchurch* (4); *Goodright v. Sales*. (5) As to the sums of 5411*l.* and 5000*l.*, a mere declaration against merger does not prevent merger: *Swabey v. Swabey*. (6) Gibbon had become entitled not only to the property, but also to these sums, and therefore they merged: *Astley v. Mills* (7); *Hood v. Phillips* (8); *In re French-Brewster's Settlements* (9); *In re Hole*. (10)

But all three sums are really disposed of by the equitable mortgage of 1902. It would be a fraud on the mortgagee under that document if these charges were to be kept alive as against him for the benefit of Gibbon, his mortgagor: *Tyler v. Lake* (11); *Countess Dowager Gower v. Earl Gower*. (12)

Stokes, for the unmarried daughter, adopted the same line of argument.

Jenkins, K.C., in reply.

Dec. 5. NEVILLE J. The first point I have to consider is whether or not the sum of 9800*l.* has been kept alive by Mr.

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| (1) (1793) 2 Ves. Jun. 261. | (6) (1846) 15 Sim. 106. |
| (2) (1866) L. R. 2 Eq. 210; on appeal, (1867) L. R. 2 Ch. 138. | (7) (1827) 1 Sim. 298. |
| (3) (1804) 9 Ves. 509. | (8) (1841) 3 Beav. 513. |
| (4) (1724) 2 P. Wms. 236. | (9) [1904] 1 Ch. 713. |
| (5) (1767) 2 Wils. 329. | (10) [1906] 1 Ch. 673. |
| | (11) 4 Sim. 351. |
| (12) (1783) 1 Cox, 53. | |

Gibbon, notwithstanding the fact that he was the owner of the NEVILLE J. other interests in the estate. It seems to me that by the deed of October 22, 1900, he sufficiently declared his intention of keeping this security alive, and I do not think that the form of the words by which he has done so is sufficient to prevent the real and personal representatives at his death from taking the property as they find it. It seems to me that here you only have the expression of what would be implied in a case where it was for the benefit of the owner of the estate to keep the charge alive, and I think that, where you have an express provision equivalent only to the implication which the law makes where it is for the benefit of the owner, the result must be the same. In my opinion, where it is to the advantage of the owner of an estate to keep alive a charge the Court will imply an intention on his part to keep it alive, and upon that implication upon his death, intestate, the charge will descend to the next of kin and not to the heir-at-law; and I may say in passing that I see no difference between the case of heir-at-law and next of kin and the case of devisees and legatees. The next point is whether by the deposit of May 1, 1902, the intestate, with regard to that security, had altered his intention of keeping the 9800*l.* alive and indicated an intention of merging it. I find no indication of such an intention, and for this reason, that he has deposited the title deeds both of the fee and of the term; and it seems to me, having regard to the nature of the agreement entered into at the time of the deposit, that the mortgagee, if he liked, could have had a mortgage both of the fee and of the term. The result is that in my opinion the 9800*l.* is part of the personal property of the intestate.

Then I have to deal with the two sums of 5411*l.* and 5000*l.* With regard to them I think, having regard to the opinion I have come to as to the deposit of May 1, 1902, that I may treat them both as on the same footing and assume that they were kept alive by the indenture of June 15, 1874. Perhaps I ought to say, although it does not seem to me material for the purpose of my decision, that upon the construction of that document I think the "existing charges" refer as well to the 5000*l.* which was to be raised under the settlement as to the

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NEVILLE J. 5411*l.*; but in my opinion the effect of the deposit of May 1, 1908, was to merge those securities which previously to that date had been kept alive by the intestate, and I think so for this reason. The documents of title relating to these interests in the estate were not deposited with the mortgagee, and, consequently, I do not see how he could insist upon having any rights comprised in them transferred to him. What he contracts for is a mortgage of the fee, and if necessary a mortgage of the term for 1000 years, to secure the 9800*l.* The result would be that if the intestate was entitled, notwithstanding that deposit, to keep alive the other interests that he had in the property carved out of the fee, the mortgagee would be in a position which he never contemplated by the agreement of May 1, 1902. In other words I think it would be, as said in *Tyler v. Lake* (1), a fraud upon the incumbrancer to suppose that Mr. Gibbon, the intestate, had intended to keep alive these charges which would then be charges upon the estate that he had agreed to convey to the incumbrancer. I think they cannot be kept alive for other purposes and at the same time be merged for the purposes of a mortgage. If he is not entitled to keep them alive as against the mortgagee, I think they merged, and that he could not afterwards sever the interests which he held. It seems to me to follow necessarily from the decision in *Tyler v. Lake* (1) that the keeping alive of these incumbrances is not an intention which can be imputed to the intestate, because it would be imputing a dishonest intention to him. I think that is the meaning of the decision in *Tyler v. Lake* (1) and that it applies to the present case. Therefore I hold that the sums of 5411*l.* and 5000*l.* merge in the inheritance and do not form part of the personal estate.

The additional facts relating to the second question were as follows:—

Austin's mortgage of June 13, 1866, which Durant had foreclosed in 1868, included premises called No. 6, Cleveland Road, Ealing, and, on December 1, 1873, the intestate as mortgagee from Durant sold these premises to Norman Hill under the

(1) 4 Sim. 331.

power of sale in the mortgage of November 25, 1870. Meanwhile NEVILLE J. Austin had become bankrupt in 1872. After the intestate had acquired Durant's equity of redemption in No. 6, Cleveland Road and had taken out administration to Durant's estate as previously mentioned, he found that the security under the mortgage of June 13, 1866, was insufficient, and sought to prove in Austin's bankruptcy for the unsecured balance of the mortgage debt. As this involved reopening the foreclosure of 1868, the intestate obtained from Hill an indenture dated December 30, 1875, reconveying No. 6, Cleveland Road to himself. This deed contained a declaration by the intestate against dower.

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The foreclosure was subsequently reopened, and the intestate valued the security under the mortgage of June 13, 1866, at 36,000*l.*, and required Austin's trustee in bankruptcy either to redeem the mortgaged premises at that figure or to release to him the equity of redemption. Accordingly by an indenture dated August 22, 1876, the trustee in bankruptcy granted and released the mortgaged premises to the intestate discharged from any equity of redemption under the mortgage.

Jenkins, K.C., and S. Leeke. A declaration by a husband barring dower in respect of certain property does not continue to operate if the husband sells the property and subsequently repurchases it. A new declaration must be made in respect of the new tenure. Consequently, as the intestate held No. 6, Cleveland Road at the date of his death under the conveyance from Austin's trustee in bankruptcy and not under Hill's conveyance of December 30, 1875, the declaration contained in the latter deed does not apply.

Peterson, K.C., and Christopher James. The intestate has declared as regards No. 6, Cleveland Road, in a deed executed by him, "that his widow shall not be entitled to dower out of such land." The case therefore comes within the express words of s. 6 of the Dower Act, 1833 (1), and the widow is not entitled to dower.

Stokes adopted the same argument.

(1) The Dower Act, 1833, s. 6, titled to dower out of any land of her enacts: "A widow shall not be entitled to dower out of any land of her husband when in the deed by which

NEVILLE J. Dec. 9. NEVILLE J. I must hold that the declaration against dower in the conveyance of December 30, 1875, is sufficient and operates to bar the widow's right to dower.

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Question 3 (a) related to a charge for 5750*l.* which the intestate had declared should be kept alive under the following circumstances.

During 1865 and 1866 Austin granted first, second, and third mortgages of certain freehold hereditaments to three different mortgagees to secure various advances. The intestate Henry Gibbon was the third mortgagee. By an indenture dated September 15, 1870, all the holders of these mortgages joined, at the direction of Austin, in transferring the mortgaged premises, the whole of the mortgage debts due to the first and second mortgagees, and a part of that due to the intestate to Hay, Russell, and Thompson to secure 80,000*l.* The balance of the intestate's mortgage debt was postponed to the new consolidated mortgage.

On July 19, 1872, Austin was adjudicated bankrupt, and on August 20, 1879, his trustee in bankruptcy conveyed the equity of redemption in the property to the intestate, his heirs and assigns.

By an indenture of November 15, 1882, the surviving mortgagees under the mortgage of September 15, 1870, purported to assign to the intestate the sum of 5750*l.*, being part of the balance due on the consolidated mortgage, and to convey to him part of the lands comprised in that mortgage, subject to the mortgagor's equity of redemption which, as above shewn, was also vested in the intestate. This deed contained a recital that the intestate was desirous that the mortgage debt should be kept on foot for a protection against mesne incumbrances, and a declaration by the intestate that the 5750*l.* should be considered or kept on foot as a subsisting charge on the premises for the benefit of the intestate, his heirs and assigns, and as a protection against mesne incumbrances, if any such there were.

such land was conveyed to him, or by declared that his widow shall not be
any deed executed by him, it shall be entitled to dower out of such land."

Question 3 (b) related to a sum of 5000*l.* which the intestate had declared should be kept alive under the following circumstances :—

By indenture of June 23, 1902, T. J. F. Deason mortgaged certain freehold property to secure 8000*l.* By indenture of March 25, 1905, being a conveyance on sale, the then mortgagee assigned to the intestate, his executors, administrators, and assigns, the principal sum of 5000*l.* (being the amount then remaining due on the mortgage) and the full benefit of all securities for the same, and the mortgagor and mortgagee granted, conveyed, and confirmed to the intestate in fee simple the hereditaments comprised in the mortgage, except certain portions thereof which had been sold. The deed contained a recital that the mortgage should be kept on foot as a protection against subsequent incumbrances, and a declaration accordingly that the principal sum of 5000*l.* should be deemed to be a subsisting charge on the hereditaments thereby conveyed as a protection to the intestate, his heirs and assigns, against subsequent incumbrances, if any such there were, but for no other purpose.

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Jenkins, K.C., and S. Leeke. Merger having been prevented by the declarations in the indentures of November 15, 1882, and March 25, 1905, respectively, the two mortgage debts must pass as personalty. The declaration that the mortgage debt is kept on foot for the benefit of the intestate, his heirs and assigns, and as a protection against mesne incumbrances does not prevent the application of the ordinary rule: *Belaney v. Belaney*. (1) The addition to the declaration in the deed of March 25, 1905, of the words "and for no other purpose" cannot affect the question.

Peterson, K.C., and Christopher James. *Belaney v. Belaney* (1) related to the devolution of a term and has no bearing here. The declaration in the indenture of November 15, 1882, is equivalent to a declaration that the mortgage shall attend the inheritance and pass with the land. In Davidson's Conveyancing, 4th ed., vol. ii., pt. 1, pp. 324 to 333, two modes of keeping a mortgage on foot to attend the inheritance are given. In

(1) L. R. 2 Ch. 138.

NEVILLE J. precedent 23 the mortgagee assigns the mortgage debt to a trustee, and the legal estate is conveyed to the same trustee for better securing the mortgage debt, and subject thereto in trust for the purchaser, his heirs and assigns. Then there is a declaration of trust of all the premises thereby assigned, which provides that they are "to wait upon and attend . . . the inheritance . . . to protect the same from all mesne incumbrances." In precedent 24 there is no conveyance of the mortgage debt, but the legal estate in the property is conveyed direct to the purchasers freed from the mortgage debt; but there is a declaration that the mortgage and mortgage debt shall be considered and kept on foot as a subsisting charge for the benefit of the purchasers "their heirs and assigns and as a protection against all mesne incumbrances, charges, and estates, if any such there be." Both precedents are regarded as producing the same effect, namely, that the mortgage shall "attend the reversion and inheritance," and they both produce it by a declaration of trust, or of keeping alive the charge, in favour of "the purchaser his heirs and assigns." The same words must have the same effect in the present case. Lord Macnaghten, in *Thorne v. Cann* (1), refers to these precedents as authorities: see also Key and Elphinstone's *Precedents in Conveyancing*, 8th ed., vol. i., p. 525. If the mortgage debt passes as personal estate the whole object in making the declaration will be defeated.

Stokes adopted the same arguments.

Jenkins, K.C., in reply, referred to Lewin on Trusts, 11th ed. pp. 918, 922.

Cur. adv. vult.

Dec. 11. NEVILLE J. A mortgage or sum of money charged upon land is personal estate, and none the less so because it is made payable to the mortgagee or chargee, his heirs and assigns. I can find no authority to the effect that by means of a declaration in his lifetime a man can cause his personal estate to descend to his heir in case of intestacy. The only exception to the rule is, I think, the case of a term made attendant on the inheritance. The owner can by declaration

(1) [1895] A. C. 11, 13.

prevent the merger of a mortgage upon land and the equity of redemption in the same land when both vest in himself, but if the mortgage is kept alive, it is in my opinion kept alive as personal estate, and, should he die intestate while the two interests in the land are severed, it appears to me that the tree must lie as it falls, and the mortgage pass to the personal representative. In my opinion the two sums of 5750*l.* and 5000*l.* form part of the personal estate.

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The facts relating to the fourth question were as follows :—

On September 11, 1873, the intestate was admitted tenant of the manor of Tottenham in respect of three copyhold messuages. There was no custom of dower or freebench in the manor.

On January 21, 1875, the property was enfranchised, and by an indenture dated February 14, 1876, the intestate mortgaged it to two mortgagees for 3000*l.* The mortgage deed contained a recital that, the intestate being seised in fee simple in possession free from incumbrances, save existing tenancies, of three freehold messuages, and his widow, if any, being barred of dower or thirds in or out of the same, he, the intestate, had agreed to mortgage the same in manner therein appearing.

Jenkins, K.C., and *S. Leeke*. Under s. 6 of the Dower Act, 1833, a widow is not entitled to dower out of any land of her husband when by any deed executed by him it is declared that she shall not be entitled to dower out of such land. Here there is no deed executed by the husband containing such a declaration. There is only an erroneous recital of a past fact, namely, that the widow has been barred of dower. An erroneous recital may act as an estoppel against the person making it, but there is no one to take advantage of the estoppel in the present case, and it would be straining the Act unduly to treat this incorrect recital of what has been done as a declaration of present intention.

Peterson, K.C., and *Christopher James*. All that is required in the Act is a sufficient indication of intention to bar dower. It is incorrect to say that the recital referred to something that was past; it was a statement of intention by Gibbon as to

NEVILLE J. what should happen in the future, should he die leaving a widow. A recital has frequently been treated as shewing the intention of a party : *Poulson v. Wellington* (1) ; *Wilson v. Piggott* (2) ; *In re Farnell's Settled Estates*. (3)
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Stokes adopted the same argument.
Jenkins, K.C., in reply.

NEVILLE J. I must hold that the recital contained in the mortgage is a sufficient declaration within s. 6 of the Dower Act, 1833, of the intestate's intention to bar dower. Finding the recital as I do in a deed executed by the intestate immediately after he had obtained the enfranchisement of the property, I can attribute to its insertion no possible meaning or intention except to bar the widow of dower. It seems to me that when a man states that something is the case, and he is the person with whom it rests under the law to determine whether it shall be so or not, his statement must operate as a declaration of intention by him. I hold, therefore, that the dower is barred.

Solicitors for all parties : *Gibbon & Moore*.

(1) (1729) 2 P. Wms. 533.

(2) (1794) 2 Ves. Jun. 351.

(3) (1886) 33 Ch. D. 599.

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J. R. B.

TURNER v. HANDSWORTH URBAN DISTRICT
COUNCIL.

NEVILLE J.

1908

Dec. 18.

[1908 T. 1914.]

*Local Government—New Street—Intended New Sewer—Deposited Plans—
Unused new Line of Pipes—Whether a “Sewer”—Vesting in Local
Authority—Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 4, 13, 16.*

When a landowner pursuant to the by-laws of a local authority gives notice of his intention to lay out a new street and to construct therein a line of pipes as a sewer, and his deposited plans are passed, and the line of pipes or sewer is constructed under the supervision of the local authority and is on completion approved and duly authorized to be covered in, such line of pipes (though unused) immediately thereupon becomes a “sewer” which vests in the local authority under s. 13 of the Public Health Act, 1875, and they have power under s. 16 of the Act to connect it with their sewerage system.

MOTION.

The plaintiff and one Hughes were the owners of adjoining building estates which were in the district of the defendant council and were in process of development. Prior to 1906 a new street called Winchester Road, on the Hughes estate, had been laid out and sewered and was bounded at its eastern end by the building land of the plaintiff. Some houses on the Hughes estate drained into this sewer, which was in use as a sewer and was taken over by the council as part of their sewerage system. In October, 1906, the plaintiff, in accordance with the by-laws of the council, served them with a written notice of his intention to lay out (amongst other new streets) on his estate a new street to be called Winchester Road, with a sewer constructed of nine-inch circular pipes, and at the same time deposited at their office plans and sections of his intended works. His plans shewed that this new street was to be a continuation of the Winchester Road on the Hughes estate from its eastern boundary. Subsequently the plaintiff abandoned part of his scheme, and on February 16, 1907, deposited fresh plans and sections with the council shewing that his part of Winchester Road was to be

NEVILLE J. continued to a new street, called Stoneleigh Road, on his estate, and that the line of pipes or sewer to be laid in it was to be connected with the sewer in Stoneleigh Road. These plans also shewed that the line of pipes or sewer in his part of Winchester Road would have a gradual fall to the sewer in Stoneleigh Road and would not be connected with the sewer in the Hughes part of Winchester Road. These plans were approved by the council on March 6, 1907, and the plaintiff proceeded with his works, and his line of pipes or sewer in Winchester Road was during its construction from time to time inspected by the building inspector of the council, who approved it and duly authorized the covering in of the same when it was completed on July 25, 1908. On November 4, 1908, the surveyor of the council made a report to them under s. 16 of the Public Health Act, 1875, to the effect that in his opinion it was necessary to construct a sewer in Winchester Road to connect the sewer in the plaintiff's part of the road with the sewer in the Hughes part of the same road, and accordingly on November 26 the council served on the plaintiff a notice of their intention to enter on his land to make the necessary connection. Thereupon on December 5 the plaintiff commenced this action for (1.) a declaration that the line of pipes laid in his part of Winchester Road was not a sewer vested in the defendant council under and by virtue of the Public Health Act, 1875, or otherwise, and that they were not entitled to connect any sewer with his said line of pipes, and (2.) an injunction to restrain the defendant council from trespassing upon his land and connecting with the said line of pipes the sewer which they had given him notice that they intended to lay and construct in his land and to connect with his said line of pipes. The plaintiff now moved for an interim injunction. It appeared from the plaintiff's evidence that the council had not formally taken over either Stoneleigh Road or the plaintiff's part of Winchester Road or the sewers in those roads; that the plaintiff's said line of pipes or sewer in Winchester Road was not in use, no houses having as yet been built on his land fronting it; and that he had constructed a separate system of drains to deal with and carry off surface water and storm water. The affidavits filed on behalf of the defendant council stated

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that they had accepted the plaintiff's said line of pipes in NEVILLE J Winchester Road as a satisfactory sewer for the sewerage of houses to be erected in the plaintiff's part of that road, and that the council were prepared to pay any compensation which the plaintiff might lawfully claim from them for any damage he might sustain from the execution of the works mentioned in their notice to him.

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Jenkins, K.C., and *A. A. Bethune*, for the motion. This line of pipes is the private property of the plaintiff, and, although it may hereafter be used as a sewer if houses are built on his land fronting it, it is not a "sewer." It certainly is not a "drain" as defined by s. 4 of the Public Health Act, 1875, because it is not in use, and for the same reason it is not a "sewer" within that section. (1) To be a "sewer" it must drain something, that is to say, it must be in use to carry away sewage; a flow is necessary: *Meador v. West Cowes Local Board* (2); *Pakenham v. Ticehurst Rural Council*. (3) The mere fact that the plaintiff's plans for the construction of this line of pipes were sanctioned by the council does not make the line of pipes when completed a sewer: *Handsworth Local Board v. Taylor*. (4) It is a private line of pipes and the council are not entitled to connect it with their sewerage system. The plaintiff is therefore entitled to an injunction.

(1) The Public Health Act, 1875, s. 4, defines the word "drain" to mean "any drain of and used for the drainage of one building only, or premises within the same curtilage, and made merely for the purpose of communicating therefrom with a cesspool or other like receptacle for drainage, or with a sewer into which the drainage of two or more buildings or premises occupied by different persons is conveyed"; and the word "sewer" to include "sewers and drains of every description, except drains to which the word 'drain' interpreted as aforesaid applies . . ."

sewers within the district of a local authority . . . shall vest in and be under the control of such local authority."

SECT. 16: "Any local authority may carry any sewer through across or under any turnpike road, or any street or place laid out as or intended for a street, . . . and, after giving reasonable notice in writing to the owner or occupier (if on the report of the surveyor it appears necessary), into through or under any lands whatsoever within their district."

(2) [1892] 3 Ch. 18, 30.

(3) (1903) 67 J. P. 448.

SECT. 13: "All existing and future

(4) (1893) [1897] 2 Ch. 442, n.

NEVILLE J. *Macmorran, K.C.*, and *S. G. Lushington*, for the council.

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The definition of a "sewer" in s. 4 of the Act does not say that user is necessary to constitute a sewer; it leaves that point open. The plaintiff's deposited plans shewed, in accordance with the by-laws, this line of pipes as the sewer for the new street. There was no obligation upon him to construct his works, but when the line of pipes was completed in accordance with his plans and was approved and authorized to be covered in by the council it thereupon became a "sewer" which vested in them under s. 13 of the Act, and under s. 16 they have power to connect it with their other sewers, and the plaintiff's only remedy (if any) is compensation. We admit it is a satisfactory sewer, and it is submitted the council could not hereafter serve a notice under s. 150 of the Act on the ground that this street was not sewered to their satisfaction: *Handsworth District Council v. Derrington* (1); *Hornsey Local Board v. Davis* (2); *Beckenham Urban Council v. Wood*. (3)

Jenkins, K.C., in reply. There is no authority for saying that an unused line of pipes in private property is a sewer. The council never formally before the action took over this line of pipes as a sewer. The statement in their affidavit that they have accepted it is an afterthought.

NEVILLE J. I think in this case that no injunction should be granted. I have not on the present application to decide whether or no this new street or road has been sewered to the satisfaction of the local authority, although I must say that, on the evidence the defendants have themselves put in, it seems to me quite impossible they can hereafter contend that it was not sewered to their satisfaction. The question I have to consider is whether this line of pipes is a sewer vested in the defendants as the local authority of the district. In my view of the Act it is. In my opinion this line of pipes or thing (without describing it further) shewn in the plans submitted to the defendants as the intended sewer for the new street, and passed by them as a sewer, would undoubtedly, being part of the sanitary arrangements

(1) [1897] 2 Ch. 438.

(2) [1893] 1 Q. B. 756, 762.

(3) (1896) 60 J. P. 490.

to be made in connection with the laying out and construction of the new street under the provisions of their by-laws, be a sewer within the meaning of the Act which would on its completion vest in the local authority, at all events immediately after it was approved and authorized to be covered in. I think, therefore, that there must be no order on the motion, except that the costs of the motion be costs in the action.

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[Note.—The parties subsequently agreed that no further steps should be taken in the action by either party, and that the action should be allowed to die out for want of prosecution, the plaintiff paying the defendants an agreed sum for costs.]

Solicitors: *Sayle, Carter & Co., for Turner & Hadfield, Birmingham*; *Stow, Preston & Lyttelton, for E. Ward, Handsworth.*

H. L. F.

In re NIGHTINGALE.
BOWDEN v. GRIFFITHS.

NEVILLE J.
1909
Jan. 11.

[1905 N. 1042.]

Will—Construction—Gift to Persons who would under the Statute of Distributions be the Next of Kin of Testator's Daughter if she had died unmarried—Joint Tenancy or Tenancy in Common.

The rule of construction established by *Bullock v. Downes*, (1860) 9 H. L. C. 1, is that, where there is a gift to a class to be ascertained by reference to the Statute of Distributions, not only the objects of the gift, but the shares and manner in which those objects take, are *prima facie* to be ascertained according to the statute. Such a rule of construction ought not to be frittered away by nice distinctions as to the particular words used. The members of a class to be so ascertained will therefore, unless the will shews clear evidence of a contrary intention, take as tenants in common and not as joint tenants.

DANIEL NIGHTINGALE by his will dated March 16, 1865, gave all his real and personal estate to trustees upon trust for sale and conversion as therein mentioned, and to pay the income to his wife for her life, and after her death upon certain trusts for the

NEVILLE J. benefit of his daughters during their lives, and their children afterwards, with powers of appointment to their respective husbands for their lives, and proceeded: "But if any of my said daughters shall die without issue then the unappointed share of my daughter so dying shall go to such person or persons for such estate or estates and generally in such manner as such daughter whether covert or sole may by deed with or without power of revocation and new appointment or by her last will or any codicil appoint but so that any disposition to or in favour of any husband shall be for his life only and subject to the limitations aforesaid the share of each of my daughters so surviving me shall go to such person or persons as under the statutes for the distribution of intestates' estates would be her next of kin if she had died unmarried."

The testator died on October 28, 1869, leaving his wife and five daughters him surviving. All the daughters survived the wife. Of these Elizabeth, who died first in 1891, and Emma, who died next in 1892, died intestate, spinsters, without having exercised their powers of appointment, and in each case leaving their surviving sisters their sole next of kin.

This summons was taken out by the trustees of the will for the determination of the question, among others, whether the surviving sisters of Elizabeth and Emma took their shares as joint tenants or as tenants in common.

Peterson, K.C., and *H. Fellows*, for the trustees.

Butcher, K.C., and *Ward Coldridge*, for the representatives of Mrs. Griffiths, who was the last survivor of the sisters. The rule of construction is stated by Stuart V.-C. in *Horn v. Coleman* (1): "If the language of the gift refers simply to the statute to ascertain the individuals without referring to the statute as defining the title, the legatees will take as joint tenants." He cited *Withy v. Mangles* (2) and *Elmsley v. Young* (3) as establishing that rule, and his statement of the rule is approved by Lord Kingsdown in *Bullock v. Downes*. (4) But in that case and in *Horn v. Coleman* (1) the words were "entitled according to the statute,"

(1) (1853) 1 Sm. & Giff. 169, 173.

(2) (1841) 4 Beav. 358.

(3) (1835) 2 My. & K. 780.

(4) 9 H. L. C. 1.

and Stuart V.-C. and the House of Lords held that those words referred to the statute as defining the title, and that the legatees took as tenants in common. In *In re Greenwood's Will* (1) there were no words referring to title, and Stuart V.-C. followed his own rule and decided that the legatees took as joint tenants. In *In re Rees* (2) the words were "entitled by virtue of the statute," and in *In re Ranking's Settlement Trusts* (3) Giffard V.-C. held that the words "under and according to the statute" shewed the same intention to refer to the statute as defining the title. Neither of those cases are really against us.

Jenkins, K.C., and *L. Mossop*, for the representatives of the testator's daughter Mary, who died after Elizabeth and Emma but before the other two daughters. Under the gift in the testator's will the next of kin take as tenants in common. Since the decision in *Bullock v. Downes* (4) the Courts have taken the broad view that, if there is a reference to the statute to ascertain the persons to take, they take the shares which they would take under the statute, whatever the particular words may be. The argument addressed to the Court failed in *In re Ranking's Settlement Trusts* (3), which is later than and quite contrary to *In re Greenwood's Will* (1). The report of *Bullock v. Downes* (4) was not published till 1863 and therefore was not cited in *In re Greenwood's Will* (1), which was decided in December, 1861. In Theobald on Wills, 7th ed. p. 336, this rule is stated broadly: "If there is a reference to the statute, the statute regulates the nature of the interest, as well as the persons, who are to take under it."

Cyprian Williams, C. St. J. W. Nicholson, C. G. Church, and E. Beaumont, for other parties.

Butcher, K.C., in reply.

NEVILLE J. This case depends upon what is the true rule of construction recognized by the House of Lords in the case of *Bullock v. Downes* (4). That there was a rule recognized in that case there can be no doubt, and the question is what is the extent of it.

(1) (1861) 3 Giff. 390.

(2) (1890) 44 Ch. D. 484.

(3) (1868) L. R. 6 Eq. 601.

(4) 9 H. L. C. 1.

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In my opinion the rule which was there referred to was that where there is a gift to a class to be ascertained by reference to the Statute of Distributions the shares are *prima facie* to be in accordance with the statute as well as the objects of the gift. Of course a contrary intention may be expressed by the will.

The rule itself appears to me to be a matter of inference. I cannot say that I can find upon the construction of the words used in the numerous cases which were cited to the House of Lords any expression of intention that the shares should be in accordance with the Statute of Distributions, and it seems to me that that is so whether the gift be a gift, as in the present case, for such person or persons as under the Statute of Distributions of intestates' estates would be the next of kin, or a gift to such persons as would be entitled under the statute, or as would take according to the statute. In each case it seems to me you have a method of ascertaining who the class to take are and a complete silence as to the shares in which they are to take. But the Courts have thought it right to infer from the reference to the Statute of Distributions that the testator had in his mind the shares only which under that statute the next of kin would be entitled to take.

I think, therefore, that no distinction ought to be founded upon the various forms of expression which one finds used in cases where the class are to be ascertained by a reference to the Statute of Distributions. I may repeat what I have often said before, that where a rule of construction exists it seems to me the worst possible policy to draw nice distinctions between the words used.

It seems to me the rule should be taken in as universal a way as possible in order that persons interested under wills may have some reasonable chance of knowing what the Courts will hold to be their interpretation. I think, therefore, that I can draw no distinction between the words used in this case and the words used in the numerous cases that have been cited to me in which it has been held that a gift to a class to be ascertained by reference to the Statute of Distributions is a gift to them as tenants in common and not as joint tenants.

The question must be answered by declaring that the surviving NEVILLE J. sisters in each case took as tenants in common.

Solicitors: *King, Wigg & Co., for George Armstrong & Sons, Newcastle-on-Tyne; Hillearys; H. C. Mossop & Co.; Hubert Smith; Hicks, Arnold & Mozley.*

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PARKER J.

[1908 S. 214.]

1908

Trustee—Investment—Mortgage—Breach of Trust—Hazardous Security—Depreciation—Valuation—Negligence—“Two Thirds” limit—Method of Valuation—Repairs—Leases—Trustee Act, 1888 (51 & 52 Vict. c. 59), s. 4—Trustee Act, 1893 (56 & 57 Vict. c. 53), ss. 8, 9—Judicial Trustees Act, 1896 (59 & 60 Vict. c. 35), s. 3.

Nov. 30;
Dec. 1, 2, 3, 4,
12.

The plaintiffs brought an action for a declaration that an investment of 4400*l.* trust moneys on mortgage of freehold house property was a breach of trust and that the mode in which the property was subsequently neglected was a further breach of trust, on the ground that the property was not a proper security for any part of the trust funds; that the trustees did not have a valuation made by a properly instructed and independent valuer; that the valuation which was in fact made was unsatisfactory; that the mortgagor ought to have covenanted to keep the property in repair and ought not to have been empowered to grant leases. The property depreciated in value and two of the mortgaged houses ceased to be let and fell into disrepair, and the beneficiaries contended that the trustees ought to have taken steps from time to time to ascertain the condition of the property:—

Held, that it was not proved that the property was of such a nature as to be wholly improper for the investment of trust moneys, but that the valuation obtained by the trustees was not such a valuation as is contemplated by s. 8 of the Trustee Act, 1893. The duties of trustees acting without such a valuation considered, and the trustees held not to have acted as prudent men nor to be entitled to the benefit of s. 3 of the Judicial Trustees Act, 1896.

In applying s. 9 of the Trustee Act, 1893, the Court will be guided by the principles which obtained before the passing of the Trustee Act, 1888, as to the margin of value to be required. Applying these principles, the Court held that the property was a good security for at most 3400*l.* and that the trustees must make good the balance.

Held, that the trustees were not liable under the circumstances of this case for not insisting on a covenant to repair, or a clause precluding the

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mortgagor from granting occupation leases or for neglect to inspect the mortgaged property from time to time.

Methods of valuation and the duties of valuers discussed.

ACTION by the beneficiaries under the will of Mrs. Davis against a surviving trustee and the representatives of a deceased trustee for a declaration that an investment of 4400*l.* in 1897 on mortgage of freehold house property at Folkestone was a breach of trust, and that the mode in which the security and the property therein comprised were subsequently neglected and dealt with was a further breach of trust; and that the defendants were jointly and severally liable to make good the loss.

Mrs. Davis made her will in 1891, and appointed John Henry Cates and Mildred Whiteley executors and trustees thereof, with power to invest the trust funds upon any securities upon which money under the control of the Court might for the time being be authorized by law to be invested. The testatrix died in June, 1891. In 1897 the trustees advanced 4400*l.* out of the trust funds to T. L. Fearon on the security of freehold property at Folkestone. The plaintiffs alleged that the property was an improper security for any part of the funds, being of a speculative nature and consisting partly of unfinished houses; that the trustees did not have a valuation made by a properly instructed and independent valuer; and that in itself the valuation which was in fact made was unsatisfactory. They contended, further, that the mortgagor ought to have covenanted to keep the premises in repair and ought not to have been empowered to grant leases.

Mildred Whiteley died in 1903, having by her will given all her property to her sister Eliza Whiteley and appointed J. Greenwood her executor. He wound up the estate and handed over the assets to Eliza Whiteley. In December, 1903, F. J. Winkley was appointed a trustee of the will of Mrs. Davis in the place of Mildred Whiteley.

After that date house property at Folkestone depreciated in value, and two of the mortgaged houses were unlet for some time and fell into disrepair. Interest was paid till 1906, and a notice given to Fearon in September of that year to pay off the mortgage was disregarded. In 1907 Fearon executed a deed

of assignment for the benefit of his creditors, and he died in PARKER J. July, 1907. The plaintiffs alleged that between 1897 and 1906 the trustees had taken no steps to ascertain the condition of the mortgaged premises.

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The effect of the evidence is fully given in the judgment of Parker J.

Romer, K.C., and *Wurtzburg*, for the plaintiffs. The first question is whether, apart from the Trustee Acts, this was a trust security at all. We submit that the trustees were not justified in advancing any part of the trust funds on such a security. The property was of a speculative nature and consisted of unfinished and unlet houses. It has been held in *Rae v. Meek* (1) and *Smethurst v. Hastings* (2) that unfinished houses are not an authorized security. A hazardous security is an improper investment: *Learoyd v. Whiteley*. (3) The actual value of the property is immaterial; the question is whether it is speculative or hazardous, and that depends on the evidence in each case. Secondly, the defendants cannot take advantage of s. 9 of the Act of 1893 and say that this is a good security for part of the amount advanced: *In re Walker*. (4)

[PARKER J. referred to *In re Hunt's Settled Estates*. (5)]

Sect. 9 has no application to improper securities. The trustees have to shew that they have done their duty and obtained good security for income as well as capital. It is not enough to say that the property was likely to increase in value: *In re Somerset*. (6) Thirdly, the defendants are not protected by ss. 8 and 9 of the Trustee Act, 1893, or s. 3 of the Judicial Trustees Act, 1896. All the persons employed in connection with the mortgage seem to have acted on the mistaken supposition that trustees may make advances to the extent of two thirds of the value in all cases. That is a mistake. All the circumstances must be taken into consideration before the proportion can be fixed. There was no valuation which could satisfy the requirements

(1) (1889) 14 App. Cas. 558.

(4) (1890) 59 L. J. (Ch.) 386.

(2) (1886) 30 Ch. D. 490.

(5) [1905] 2 Ch. 418; [1906] 2

(3) (1887) 12 App. Cas. 727.

Ch. 11.

(6) [1894] 1 Ch. 231.

PARKER J. of s. 8 of the Trustee Act, 1893. It was the duty of the trustees before making a loan to have the property reported on by a valuer appointed by themselves and independent of the mortgagor: *Fry v. Tapson* (1); and the defendants did not do that. This old rule was continued by s. 4 of the Trustee Act, 1888, and s. 8 of the Trustee Act, 1893, and those sections constitute a standard by which reasonable conduct is to be judged for the purpose of determining whether under s. 3 of the Judicial Trustees Act, 1896, a trustee ought to be relieved from liability: *In re Stuart*. (2) In that case, as in the present case, the valuer was employed by a solicitor who also acted for the mortgagor. Here the valuation itself was unsatisfactory; Barton, the valuer, assumed that there would be a right of access to the back of the premises, but in fact there was no such right. Further, the trustees ought to have obtained from the mortgagor a covenant to repair, and ought to have inserted a clause precluding him from granting occupation leases under s. 18 of the Conveyancing Act, 1881, and they ought to have had the property inspected from time to time, and especially at the end of the five years mentioned in the valuation.

A. Grant, K.C., and Gatey, for the defendants Cates and Winkley. In 1897 the property was a proper authorized security upon which the trustees were quite justified in lending trust money. Even if in some respects the valuation was not technically made on their behalf, which we do not admit, it was a good valuation in other respects. The trustees were entitled to accept the security, and there was no reason why they should have afterwards inspected the condition of the property from time to time. It has never been held that it is the duty of a trustee who holds a mortgage to make inquiries as to the value of the security or the solvency of the mortgagor, unless something happens to arouse suspicion. It is not the duty of a trustee to overhaul his mortgages from time to time: *In re Chapman* (3); *Rawsthorne v. Rowley*. (4)

The question depends upon what was the value of the property

(1) (1884) 28 Ch. D. 268.

(2) [1897] 2 Ch. 583.

(3) [1896] 2 Ch. 763.

(4) (1907) 24 Times L. R. 51; see the judgments in this case p. 409, post.

in 1897. The trustees are not solely dependent on having a proper valuation within s. 8 of the Trustee Act, 1893. The test is not valuation, but value. If we had had no valuation at all, but could prove that at the time the property was of sufficient value, we should be as much protected as if we had had a proper valuation. This property was of sufficient value. The best evidence of that is Barton's valuation made at the time. His honesty is not disputed, and it is no reflection on him that he was shewn the property by the mortgagor; no one else could do it. The fact that he fixed his fee with the mortgagor is immaterial.

[PARKER J. referred to *In re Partington*. (1)]

His valuation was obtained for the purposes of this mortgage and is the only one made at the time. The Court has no right to go behind the valuation and inquire on what footing it was arrived at. The only question is whether the valuation was honest and whether we have acted reasonably. Trustees are not bound to ask their valuer on what grounds he based his opinion; and trustees who do so are really making their own valuation. The fact that the same solicitors acted for both parties is not necessarily fatal. The instructions given by the trustees were reasonable and sufficient, and they believed that Barton was independent. In *In re Stuart* (2) the trustees had no belief that the valuation was made independently of the mortgagor. It was not the duty of the trustees to make inquiries about the proposed stables. If a valuer makes a mistake with respect to the possibilities of the property the trustees are protected by the rule in *Speight v. Gaunt* (3), *In re Godfrey* (4), and *Jones v. Lewis*. (5) There is no doubt that it is generally assumed that the old rule has been altered and that trustees may now invest on mortgage of house property up to two thirds of its value: Lewin on Trusts, 11th ed. p. 370. The test of reasonableness under s. 3 of the Judicial Trustees Act, 1896, cannot be the question whether the trustee has acted strictly within s. 8 of the Trustee Act, 1893, for that would make the later section useless; and the defendants ask to be excused under that section. It was not their duty to insist

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(1) (1887) 57 L. T. 654.

(3) (1883) 9 App. Cas. 1.

(2) [1897] 2 Ch. 583.

(4) (1883) 23 Ch. D. 483.

(5) (1849) 3 De G. & Sm. 471.

PARKER J. upon the insertion in the mortgage of a clause restraining the mortgagor from granting occupation leases: Key and Elphinstone's Precedents in Conveyancing, 8th ed. vol. ii. p. 47.

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W. A. Jolly, for Eliza Whiteley, the residuary legatee under the will of Mildred Whiteley. The Court will presume that a deceased trustee has acted reasonably: *Blyth v. Fladgate*. (1) There is no reported case in which trustees have been held liable for investing more than one half the value on freehold property which was not cottage property: *In re Olive* (2); *In re Salmon*. (3) The question under s. 8 of the Act of 1893 is not whether an independent valuer had in fact been appointed, but whether the trustees believed that that had been done. The decision in *In re Walker* (4) and *In re Somerset* (5) to the contrary are inconsistent with *In re Stuart*. (6) Barton's valuation satisfies the requirements of the section; and the question is whether the trustees acted as prudent men would have done in their own affairs: *In re Pearson*. (7) Under the section it would not be safe for trustees to go behind the valuation. The section was intended to alter the two-thirds rule: Hood and Challis on the Conveyancing Act, 6th ed. p. 357.

Russell Gilbert, for Mildred Whiteley's executor.

Romer, K.C., in reply. The evidence is conclusive that the trustees did not act as prudent men would have done in their own affairs. Even if Winkley had made inquiries when he was appointed a trustee in 1903 this loss would have been avoided. In the circumstances of this case the Court will not excuse the defendants under s. 3 of the Judicial Trustees Act, 1896: *In re Turner* (8); *Jones v. Julian*. (9) [On the question of costs he referred to *Harvey v. Olliver*. (10)]

— Dec. 12. PARKER J. read the following judgment:—In this action the beneficiaries under the will of a Mrs. Davis, who died in June, 1891, ask to have the defendant Cates, a trustee of the will, and the estate of Mildred Whiteley, deceased, a former

(1) [1891] 1 Ch. 337.

(6) [1897] 2 Ch. 583.

(2) [1886] 34 Ch. D. 70.

(7) [1884] 51 L. T. 692.

(3) [1889] 42 Ch. D. 351.

(8) [1897] 1 Ch. 536.

(4) 59 L. J. (Ch.) 386.

(9) [1890] 25 L. R. Ir. 45.

(5) [1894] 1 Ch. 231, 253.

(10) [1887] 57 L. T. 239.

trustee of the will, declared liable for breach of trust in respect of the investment on October 22, 1897, of 4400*l.*, part of the trust moneys on the security of a legal mortgage of certain freehold houses in Shorncliffe Road, Folkestone. The beneficiaries contend (1.) that this investment was altogether improper, because, having regard to the nature of the property, it was too hazardous to be accepted as a trust investment; and (2.) that, even if otherwise proper to be accepted as a trust investment, it was not a proper investment for so large a sum as 4400*l.*

The defendants join issue on both these contentions, and, as to the second contention, further say that they are entitled to the protection of s. 8 of the Trustee Act, 1893, or at any rate that the defendant Cates and Mildred Whiteley, in making the investment in question, acted honestly and reasonably, taking all the precautions which a man of ordinary prudence might have been expected to take in the conduct of his own affairs, and relying, as they were entitled to rely, on expert advice as to values; and further, if those defences fail, they ask to be wholly relieved from liability for breach of trust under s. 3 of the Judicial Trustees Act, 1896, or to be partially relieved from such liability by virtue of s. 9 of the Trustee Act, 1893.

It is clear that the trustees had in the present case power to invest upon the security of freehold hereditaments. The onus, therefore, of proving that the investment in question was altogether too hazardous to be accepted as a trust investment lies upon the plaintiffs. In my opinion they have not discharged this onus. It is true that the mortgagor was a builder and had himself built the houses in question, intending no doubt to make a profit by letting or selling them. But, on the other hand, at the date of the mortgage he was, or at any rate was reputed to be, a man of substance, able to undertake, and from time to time undertaking, large contracts, and not financially dependent on borrowed moneys. It is true also that the houses were newly built; that one of them only was let and the other two not quite finished. But there was at the time a great demand for houses in Folkestone and no difficulty in obtaining tenants. Further, freehold houses were rare in Folkestone and likely to attract purchasers. Lastly, it is true that the frontages in

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Sect. 8 of the Trustee Act, 1893, is a re-enactment of s. 4 of the Trustee Act, 1888. Prior to the Trustee Act, 1888, the duties of trustees investing trust money on the security of freehold hereditaments were well known. They were entitled to rely on expert advice as to the value of the property, but if they did so, it was their duty to see that the expert was properly instructed—that he knew for whom and with what object he was advising, and that he was acting independently of the mortgagor, these being precautions which a prudent man of business might reasonably be expected to take in the conduct of his own affairs. Having thus been advised as to value, they had themselves to determine, and could not delegate it to a third party (even an expert) to determine, what amount they could prudently advance on the security in question. In determining this amount, however, they had for their guidance certain general rules laid down for the purpose by the Courts. Thus it had been laid down that as a general rule a trustee ought not to advance more than two thirds of the value of the property if it were freehold agricultural land, or more than one half of the value if the property were house property or buildings used in trade, it being considered that a prudent man in the management of his own affairs would ordinarily require for his protection in the one case a margin of

at least one third of the value, and in the other case, having regard to the nature of the property, a larger margin, usually stated as one half of the value. These rules, however, were not so stringent as not to admit of exceptions based upon special circumstances, and I think that the rule as to one half margin of value, in the case at any rate of houses as distinguished from buildings used in trade, was somewhat less stringent than the rule as to one third margin of value in the case of agricultural land. In either case the onus of justifying a departure from the rule would probably lie upon the trustee, though possibly the onus might be discharged more easily in the one case than in the other. It should be remembered that the rules were rules concerning the minimum margins which a prudent man would require for his protection, and could not be relied on as justifying an advance where a prudent man would, because of other circumstances, be likely to require a larger margin. In this connection all the circumstances had to be considered, including the character and situation of the property and the actual income which the property might be producing at the time of the advance. The method of valuation adopted by the expert who had advised as to value might also, I think, be very material in considering the limit of protection which a prudent man ought to require, especially in the case of house property or buildings used for trade purposes. If, for example, the nature and character of the property had already been taken into account by the expert in arriving at the value, there would be less need to take them into account in determining the limit of protection to be required.

Sect. 4 of the Trustee Act, 1888 somewhat modified the law as above stated. It provided as follows: "No trustee lending money upon the security of any property shall be chargeable with breach of trust by reason only of the proportion borne by the amount of the loan to the value of such property at the time when the loan was made, provided that it shall appear to the Court that in making such loan the trustee was acting upon a report as to the value of the property made by a person whom the trustee reasonably believed to be an able practical surveyor or valuer, instructed and employed independently

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PARKER J. of any owner of the property, whether such surveyor or
1908 valuer carried on business in the locality where the property is
SHAW situate or elsewhere, and that the amount of the loan does not
v. exceed two equal third parts of the value of the property as
CATES. stated in such report, and that the loan was made under the
advice of such surveyor or valuer expressed in such report.”
Since the Act, therefore, a trustee has been, and is, justified in
acting on expert advice, not only as to the value of the property,
but also as to the amount he may properly advance thereon,
provided the advice be given in such manner, and by such
person, as is contemplated in the section, and that, whatever be
the nature of the property, the amount advanced is not more
than two thirds of its value. The principle involved seems to be
that within the limits of what is often called the “two thirds”
rule a prudent man may, as to the amount which can properly
be advanced on any proposed security, whether the property be
agricultural land or houses or buildings used for trade purposes,
rely on expert advice obtained with certain precautions, it being
of course assumed that in giving the advice the expert will consider
all the circumstances of the case, including the nature of the
property, and will not advise a larger advance than under all the
circumstances can be prudently made. I dissent entirely from
the position taken up by some of the defendants’ expert
witnesses, that when once they have ascertained the value of the
property they are, whatever its nature and whatever method of
valuation they have adopted, at least *prima facie* justified in
advising an advance of two thirds of its value. Such a position
in my opinion defeats the object of the section by making what
the Legislature has recognized as the standard of the minimum
protection which a prudent man will require into a standard of
the normal risk which, whatever the nature of the property, a
prudent man will be prepared to run; and it deprives the expert
advice on which the trustee is to rely as to the margin of pro-
tection to be required of all its value. It is as true now as it
was before the Act that the maximum sum which a prudent
man can be advised to lend upon a mort age depends on the
nature of the property and upon all the circumstances of the
case. If the property is liable to deteriorate or is specially

subject to fluctuations in value, or depends for its value on circumstances the continual existence of which is precarious, a prudent man will now, as much as before the Act, require a larger margin for his protection than he would in the case of property attended by no such disadvantages, and an expert who does his duty will take this into consideration.

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In the present case the trustees in April, 1897, had in hand a large sum for investment. One of the trustees, Mildred Whiteley, who was also tenant for life, was a client of Beckingsale & Co.; the other, namely, the defendant Cates, was a client of Simpson & Co., both firms being London solicitors. Consols, as indeed all trustee investments, were high, and it was important to the tenant for life to invest the money forthwith on securities which would yield a fair rate of interest. Under these circumstances it was determined to look out for opportunities to invest on freehold mortgages, and the two firms of solicitors appear to have arranged that the firm who found the security should act for the trustees in carrying the matter through. Beckingsale & Co. had a client who desired, though he was by no means anxious, to raise money on the security of certain freehold properties belonging to him. He was willing to accept two thirds of the values of the properties, whatever those values might be, and to pay $8\frac{1}{2}$ per cent. interest. On May 2, 1897, Beckingsale & Co. wrote to Simpson & Co. suggesting this security as an investment for the trust money and asking Simpson & Co.'s opinion. The letter mentions four properties, but except in one case the description is not such as to enable them to be identified. It states the values which the mortgagor put upon those properties. It mentions that the two houses forming one of the properties were not quite finished, and gives the rentals of the other properties. It mentions that 500*l.* could be kept in hand till the two houses were completely finished. It was determined to entertain this security and proposed to instruct a Mr. Field to value the properties at a fee of twenty-five guineas, but this fell through as the mortgagor refused to pay any such fee. The mortgagor suggested the employment of a Mr. Barton, who was a valuer carrying on business at Folkestone and had occasionally acted for Lloyds Bank. Mr. Barton was employed by the

PARKER J. mortgagor to collect his rents in Folkestone. Beckingsale & Co. on June 3, 1897, wrote to Simpson & Co. suggesting the employment of Mr. Barton to make the valuation, and stating that if Mr. Barton was employed the mortgage would probably go through. Simpson & Co. made inquiries as to Mr. Barton, and being satisfied with the result, on the instructions of the defendant Cates, assented to Mr. Barton being employed to value. Accordingly, on June 15, 1897, Beckingsale & Co., without further consulting the trustees, wrote a letter of instructions to Mr. Barton. The letter is expressed to be written on behalf of clients who are trustees, who propose to lend the mortgagor, who is named, two thirds of the value, to be ascertained by Mr. Barton's report, of the properties mentioned in the letter. Mr. Barton is instructed to survey these properties and report the amount which the trustees might safely lend thereon, particularizing the value of each house and stating for what period of time, say five years, the security would be good. Before undertaking the business Mr. Barton is instructed to see the mortgagor, with whom he is already acquainted, and arrange his fee. The properties are then referred to, but not in such a way (except in one case) that Mr. Barton could identify them from the description, and he is accordingly referred for further particulars to the mortgagor. Beckingsale & Co. informed the mortgagor of the purport of these instructions, and requested him to see Mr. Barton, arrange the fee, and supply all particulars required. Mr. Barton and the mortgagor accordingly met and arranged the fee, and subsequently Mr. Barton, accompanied by the mortgagor, inspected and surveyed four properties which the mortgagor stated to be the properties intended to be mortgaged. The mortgagor, in the case of the unfinished houses, pointed out the boundaries and stated the dimensions, which Mr. Barton says he verified by actual measurement. In due course, as the result of this inspection, Mr. Barton made a report dated July 5, 1897. In this report he first describes the four properties which he has surveyed. The first property is described as a pair of freehold semi-detached houses in Shorncliffe Road, Folkestone, at present not completed, with a frontage of fifty feet and a depth of one hundred and fifty feet, with a large garden at the rear,

where stabling could be erected if required. Mr. Barton says that he measured the brick and mortar frontage only, a frontage which would preclude the possibility of access to the gardens except through the house. He himself recognized this, and accordingly inquired of the mortgagor how access to any stabling was to be secured, and was told that a right of way could be given from a side street over some back land belonging to the mortgagor. He does not, however, mention this very material point in his report. The second property is described as one of a pair of semi-detached freehold houses called Ferns House, situate in Shorncliffe Road, Folkestone, in the occupation of a tenant on a four years' lease at a rent of 145*l.* per annum, with an option of purchase at the sum of 2800*l.* The fact that under the agreement on which the house was let the landlord was responsible for outside repairs is not mentioned. The two other properties are also described, and their rentals are stated at 24*l.* per annum and 129*l.* per annum respectively. The report concludes: "The property is well built, and we see no reason why our valuation should not be maintained for at least five years, as the value of Folkestone securities is by no means decreasing, the only house having the latter tendency being No. 35, Dover Street, which is in the old part of the town. We are of opinion that the whole of the securities are worth the sum of 9180*l.*, and that your clients may with safety advance two thirds of that sum on mortgage." The report is accompanied by a schedule which purports to give the several values of each of the four properties.

This report was submitted to Simpson & Co., and I gather that they advised the defendant Cates that it was sufficient to justify an advance of two thirds, though neither they nor the defendant Cates had any knowledge of the instructions on which it was made or of the manner in which those instructions had been given. Possibly, though of this I am less certain, Beckingsale & Co. submitted this report also to Mildred Whiteley and gave her similar advice, but she did not, any more than the defendant Cates, know anything of the instructions given to the valuer.

The trustees had not sufficient money in hand to make an advance of two thirds of the 9180*l.* at which the properties had

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PARKER J. been valued, and after various negotiations which it is difficult to trace, but which appear to have been conducted between Beckingsale & Co. and the mortgagor, it was arranged to make the advance on properties 1 and 2 only and to limit the advance to two thirds of the value of those properties as stated in the schedule to the report. The mortgagor had yet to complete his title to the land to be comprised in the mortgage, as also to the back land over which he had proposed to Mr. Barton to grant an easement of access to any stables which might be erected in the gardens of property No. 1. This was done in due course, and Beckingsale & Co. prepared a draft mortgage in which they included all the land to which the mortgagor thus derived title and limited the amount to be advanced to 4000*l*. Why they did this it is impossible now to say; but the mortgagor objected, and pointed out on the plan annexed to his conveyance the properties to be included in the mortgage, and that two thirds their value, namely, 4400*l*., was the amount arranged to be advanced. The solicitors yielded in both respects, omitting to notice what was reasonably apparent on this plan, that if the property pointed out by the mortgagor were the property to be mortgaged no stables were possible. They did not consult Mr. Barton as to what he had valued or themselves inspect the property, but they assumed that the mortgagor's statement was correct, and the mortgage was ultimately completed on this footing, a sum of 400*l*. being kept back in respect of the unfinished houses and subsequently handed over with a letter of Mr. Barton to the mortgagor stating that the houses were so nearly completed that it might be handed over by the mortgagees without any material risk. It appears that what remained to be done was only the papering and the last coat of paint to the inside wood-work. In the case of one of the houses this was never in fact done.

I have come to the conclusion that, under the circumstances which I have shortly stated, Mr. Barton's report is not such a report as was contemplated by the Act. To advise an advance of two thirds of the value of four properties is not the same thing as advising an advance of two thirds of the value of any one or more of the properties apart from the others or other.

This is more especially the case where one of the properties is not at the date of the report an income-bearing property. As I have already pointed out, the amount of income which a property is producing is material in considering what amount can properly be advanced thereon. In the present case the income of three of the four properties originally proposed to be mortgaged was sufficient to provide, with a considerable margin, for the payment of interest on the amount proposed to be advanced, although the other property was unlet. The importance of this point was fully recognized by Beckingsale & Co. when considering the propriety of an advance on the first three properties mentioned in the report only, the income of which was more than sufficient to provide for the interest. I cannot explain why they no longer thought it of consequence when they came to consider the propriety of an advance on the first two properties, the existing income from which did not amount to the interest on the proposed advance.

In my opinion the advance which was actually made was not the advance which Mr. Barton advised, and his report, therefore, cannot be relied on as within s. 8 of the Trustee Act, 1893. Again, I do not think that Mr. Barton was in fact instructed and employed independently of the mortgagor. He was suggested by the mortgagor, instructed by the mortgagor's solicitors, referred to the mortgagor both as to his fee and as to the properties he was to value, and was accompanied by the mortgagor when he made his survey. I am not suggesting that he was consciously influenced by the mortgagor or that he acted otherwise than honestly in the matter, but I do not think that he in fact fulfilled the conditions mentioned in the section as to his instructions and employment. If, according to the true meaning of the section, the belief of the trustees is the material point, I am unable to hold that the trustees did reasonably believe that Mr. Barton was instructed and employed independently of the mortgagor. They left the instructions to be given by Beckingsale & Co., who were also the mortgagor's solicitors, and after ascertaining that Mr. Barton was a competent person took no further trouble in the matter.

Lastly, it appears that one of the properties which Mr. Barton

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PARKER J. in fact valued differed from that actually comprised in the mortgage, because Mr. Barton valued a property with an easement of access across other land of the mortgagor, whereas the mortgage contained no such easement. I need not express an opinion whether this alone would, under the circumstances, have prevented the trustees from relying on the section. I mention it because the fact seems to me to illustrate the importance of the surveyor who makes the valuation being independently instructed and employed. In valuing for the mortgagor, and on information supplied by the mortgagor, it might have been immaterial to mention this suggested easement, the proposed dominant and proposed servient tenement being in the same hands. In valuing for a mortgage of the proposed dominant tenement it was a point of great importance, and yet there is no mention of it in Mr. Barton's report, and because of this omission, coupled with the subsequent readiness of the solicitors to accept the mortgagor's statement of the property to be included in the mortgage, the mortgagees have got a property without an easement, whereas Mr. Barton valued it with an easement. I very much doubt whether this could have happened if the surveyor who made the valuation had been instructed and employed independently of the mortgagor, and had not in talking matters over with the mortgagor been influenced by the mortgagor's view of how he could deal with his various properties to the best advantage, as opposed to the question what the mortgagee of one of these properties could make of it.

If, apart from s. 8 of the Trustee Act, 1893, I ask myself whether in the matter of this mortgage the trustees acted reasonably and took all the precautions which a prudent man acting in his own affairs might be expected to have taken, I can only answer the question in the negative. In leaving Mr. Barton to be instructed by their solicitors, whom they knew to be acting for the mortgagor, in taking no means to see that he was properly instructed or that he was instructed and employed independently of the mortgagor, in not themselves considering the surveyor's report when made, but leaving it to their solicitors to decide whether the report might be acted on, in making an advance not advised in the report to two thirds of the value of two only

of the properties mentioned in the report, notwithstanding that one of the properties consisted of unfinished houses—in all this it seems to me that they failed to act as a prudent man might reasonably be expected to act in the management of his own affairs.

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I am of opinion also that under the circumstances, however honestly they acted—and no one has suggested or could suggest that they did not act honestly—they cannot be said to have acted reasonably within the meaning of s. 3 of the Judicial Trustees Act, 1896, if only because they neglected to do what a reasonable man would do in the prudent management of his own business.

It remains, therefore, to consider whether the three houses comprised in the mortgage were in fact of sufficient value to justify an advance of trust money to the amount of 4400*l.*, and, if not, for what amount they might properly have been accepted as security by the trustees; for having decided that there was nothing hazardous in advancing trust moneys thereon the trustees are, in my opinion, entitled to the benefit of s. 9 of the Trustee Act, 1893.

For the purpose of considering these questions it seems to me that the Court ought to be guided by the same general considerations which would have guided it prior to the Trustee Act, 1888. Sect. 8 of that Act merely protects trustees who within certain limits and under certain circumstances act on expert opinions as to the amount they may advance. It does not, as has been suggested, abrogate all distinction between agricultural land and houses or buildings used for trade in determining the margin of protection to be required by a prudent man, or indicate that a prudent man may, *prima facie*, be content in all cases with a margin of one third the value of the property. At most it suggests that the extra margin of protection beyond one third the value depends on the particular circumstances of each case, and assumes that whatever may be the nature of the property the expert employed will give the matter his *bona fide* consideration, advising with a view to the security of the trust money, and not only in such a way as to protect the trustees from liability for breach of trust. In cases not within the section it perhaps suggests that the rule which the Courts had laid down in the

PARKER J. case of houses and buildings used for trade is less stringent than
1908 the two thirds rule laid down in the case of agricultural land,
SHAW and this I believe to have been the case before the Act. As well
v. since the Act as before it, it is therefore necessary to consider
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but also the margin of protection which a prudent man would
require remembering that the margin of protection to be required
must depend on the nature of the property and all the circum-
stances of the case.

In the present case there is, as usual, considerable divergence of opinion among the expert witnesses not only as to the actual value, but as to the method which ought to be followed in arriving at such value. Everybody, however, seems to agree that the first step is to arrive at a net rental and then to capitalize this rental on the appropriate interest table. I dissent, however, altogether from the evidence of those witnesses who thought the proper way of arriving at a net rental was to calculate 4 per cent. interest on what the mortgagor paid for the land and 6 per cent. interest on what he spent in building the houses. It may be that a prudent man will not build a house unless he has a reasonable chance of getting a rent equivalent to this interest, but men who build houses are not always prudent men. The only real test of what rent a house will fetch lies in considering what tenants are likely to give. Mr. Barton valued the house formerly known as Ferns House but now as Glenthorne in the following manner. He found it was let at 145*l.* per annum, the landlord being responsible for outside repairs and the tenant for inside repairs and all other outgoings. He thought this a fair rental, but deducted 15*l.* for outside repairs and insurance, getting a net rental of 130*l.* This he capitalized on the 5 per cent. table, getting a capitalized value of 2600*l.* Similarly he thought the other two houses, known as Wellbeck and Beechmount, would, if let on the same conditions, produce a rent of 110*l.* each. In this case he deducted 10*l.* for repairs and insurance, getting a net rental of 100*l.* for each house. This he capitalized on the same interest table, getting a capital value of 4000*l.* for the two houses. He capitalized on the 5 per cent. table because at the time he considered that an investor in freehold

property of this class would want 5 per cent. for his money. I PARKER J. think a prudent investor who wanted 5 per cent. for his money would not be content with this method of valuation, because 1908 it leaves altogether out of account the contingency of the property being at times unlet, and the cost of employing agents to relet it, and other contingencies of the sort. This point was all the more material because Glenthorne was let only for a short period and the other two houses were unlet. An investor would probably have insisted either that some deduction should be made from the net rental to meet contingencies of this kind, or else that the net rental should be capitalized on a higher interest table so as to allow a margin for contingency. From the point of view, therefore, of an investor requiring 5 per cent. for his money Mr. Barton's valuation was, in my opinion, too high, even assuming his net rentals to be correct. From this point of view and on this assumption, allowing only $7\frac{1}{2}$ per cent. for contingencies, which is, I think, a moderate sum, the outside value of the properties would be approximately 6100*l*.

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The experts called on behalf of the plaintiffs thought that Mr. Barton had over-estimated the net rentals and capitalized on too low an interest table. I am inclined to think that, valuing for a mortgagee, he would have been better advised to make his calculations on somewhat lower rentals. From a mortgagee's and even from an investor's point of view the important point is what net rental he can under existing conditions be always sure of getting, not what he may reasonably hope to get if he waits for a tenant who is anxious to lease the property in question. This is a point to be remembered in determining the margin of protection which a prudent man would have required. On the other hand I have come to the conclusion that, under the existing circumstances, capitalization on the 5 per cent. table was not too sanguine. At the very outside, therefore, I do not think that the three houses were worth more than 6100*l*., and this value, whatever the nature of the property, would not justify an advance of 4400*l*., especially as the property was house property. I do not, therefore, see how the trustees responsible for the investment can escape liability for breach of trust.

It is far more difficult, however, to estimate now what a

PARKER J. prudent man in 1897 would have been justified in advancing on the property. It will be observed that in the method of valuation adopted allowance has already been made for repairs, insurance, and a certain class of contingencies; and further, in calculating the value on the 5 per cent. interest tables, the class of property has been to some extent already taken into account. On the other hand two of the houses were to some extent unfinished, and all of them were situate in a road only partly developed for building purposes and in a town the varying popularity of which as a seaside resort must always be an important element in determining values.

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Considering all the facts of this case, I have come to the conclusion that the largest sum for which the property could be considered a good security in 1897 is 3400*l.*; and therefore, under s. 9 of the Act, the trustees' liability is confined to making good the excess of the sum actually advanced over this amount and with interest.

There are a few further points with which I ought to deal. First, I do not think that a trustee is, in ordinary cases, guilty of negligence merely because he does not insist on having in the mortgage either (1.) a clause precluding the mortgagor from granting occupation leases under s. 18 of the Conveyancing Act, 1881; or (2.) a covenant by the mortgagor to keep the mortgaged hereditaments in repair. In the present case I see no reason why such a clause or such a covenant was necessary. Secondly, it is suggested that at the end of the five years mentioned in Mr. Barton's report the trustees ought to have reconsidered the propriety of their security. In October, 1902, however, the fall in the value of house property in Folkestone had either not commenced or was only just commencing, and, assuming that the trustees had then reconsidered the matter, I am satisfied that under the then existing circumstances, they might properly have continued a loan of 3400*l.* on the property. Under these circumstances, having regard to my decision on the main part of the case, no damage has accrued by this alleged breach of duty on their part.

Lastly, it is said that the trustees, including the defendant Winkley since his appointment on December 16, 1903, never

until the year 1906, when the interest on the security ceased to be paid by the mortgagor, went near the property or had it inspected on their behalf, so that they failed to find out that two of the houses were unlet and falling into disrepair. It is suggested that had they inspected the property and found this out it would have been their duty to realize their security, and that if they had done so they might have recovered the whole mortgage money, either by selling the mortgaged hereditaments at a time when they were more valuable than they are now, or by enforcing the mortgagor's covenant.

Upon the evidence before me I think that in October, 1902, an inspection of the property would not have revealed anything making it incumbent on the trustees to realize. I gather that interest ceased to be paid, and the mortgagor was practically insolvent, in the summer of 1906, and in the summer of 1906 the value of the mortgaged hereditaments was not greater than it is now. The neglect to inspect the property, from which it is alleged that damage has arisen, must therefore be placed between October, 1902, and, say, July, 1906, a period less than four years. I am not prepared to hold that the trustees are guilty of negligence because they did not inspect the property between these dates. The duty of trustees with respect to periodic inspection of mortgaged properties has, so far as I am aware, never been the subject of judicial decision. The cases of *In re Chapman* (1) and *Rawsthorne v. Rowley* (2) would seem to suggest that there is no such duty; but, under the circumstances, it is not necessary for me to express an opinion on the point.

Solicitors: *A. Savage Cooper & Everett; Simpson, Palmer & Winder; Brighten & Lemon.*

H. C. R.

The full judgments delivered in *Rawsthorne v. Rowley*, 24 Times L. R. 51, were as follows:—

COZENS-HARDY M.R. I should be very sorry if I felt bound to dismiss this appeal, and to take the same view of the facts and the law as that taken by the learned Vice-Chancellor. When you are dealing with an authorized investment, whether it be an investment authorized in the sense that the

(1) [1896] 2 Ch. 763. (2) 24 Times L. R. 51; see note on this page,

PARKER J. trustees may themselves make the investment or whether you are dealing with a specific investment transferred to the trustees and thereby becoming authorized, although not an investment which they themselves might have made, in either case I do not believe that there is any obligation or duty on the part of trustees to make periodical or further investigations as to either the title of the security or the solvency or the sufficiency of the mortgagor. I must not be taken, in saying that, for a moment to question that if there are circumstances which suggest to a reasonable man that the security is in jeopardy, the duty may not arise; but the liability of a trustee in dealing with an authorized security must really proceed on the footing of wilful default and not upon not making inquiries when he ought to do so.

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That being so, what are the facts in the present case? The lady, shortly before her marriage, had 3000*l.* which, under the advice of a member of her family, she invested on an equitable security given by Mr. A. R. Rowley, a person admittedly in good repute, and certainly believed to be at that time, and apparently being, in a strong financial position. The security given was the deposit of title deeds of forty-two houses. There is no recital or statement as to what the nature or extent of his interest was, but the lady got the personal security of Mr. Rowley and the additional security of such interest as Mr. Rowley had in these forty-two houses; and it was provided that the mortgage should not be called in for five years. Shortly afterwards the lady married, this special security being the only thing apparently comprised in the settlement. By that settlement the lady assigned the 3000*l.* and securities for the same and interest upon trust that the trustees should allow the 3000*l.* to remain invested on the security for the remainder of the term of five years or for such longer period as the trustees or trustee should deem proper, or in case Rowley should repay the same before the expiration of the term on giving notice, then upon trust to receive the same sum from him and to reinvest it. It is curious there is no express trust for calling in the money or any express trust as to how the money should be dealt with after they did call it in; but I do not doubt if they could have called it in it would have gone to the trustees of the settlement.

The learned Vice-Chancellor in his judgment said this: "Now I have first of all to consider what was, in 1879"—that is the end of the five years—"the duty of the trustees at that time. The strict duty of the trustees was at once—I do not say to have gone to a solicitor, because they may have been competent to do the business themselves, but the strict duty of the trustees was to have investigated the position of that particular security, and ascertained whether it was such security as trustees would be justified in keeping on. In order to satisfy themselves about that they would, either with or without professional assistance, have investigated the title and seen whether they had a title. Then they would have had to have the value investigated to see whether they had the proper margin, which would be 50 per cent. over the amount of the mortgage. If they had been properly advised they would have asked Mr. A. R. Rowley to give them a legal mortgage and, so far as I can see, there was absolutely no reason why they should not have taken those steps."

Now if that was the duty of the trustees, undoubtedly they were guilty of breach of trust; and the learned judge proceeded upon this footing, that in

1879, at the expiration of five years, they were guilty of a breach of trust in not taking those steps, and he logically followed it out by saying that had they called in the money then, Rowley was in such a position that he could and would have paid, and therefore the trustees ought to be saddled with this liability. With the greatest respect to the learned judge, I can see no foundation for any such liability on their part. I do not think they were under any obligation to do those things that are suggested by the learned judge. I see no reason to suppose that if they had made an investigation, if they had looked at the deeds that were deposited, if they had made inquiries as to the financial position of Rowley in 1879, they would have seen any possible reason to change the investment or to make any alteration in the position.

In a case like this, where the learned judge has found that the trustees have acted from first to last with perfect honesty, I should regret extremely if I felt myself bound under those circumstances to saddle them with this responsibility. When the crash came in 1894, if at that date it could be shewn that the present trustee and his co-trustees might have realized more by then selling the property or claiming against Rowley than they realized or can realize now, as at present advised I think there would have been a breach of trust in doing nothing if their attention had at that date been called to the fact that the security was insufficient. No such case is alleged in the pleadings; no such case is proved; and this case comes before us on the simple point, aye or no, was there a breach of trust in 1879. In my view there was no breach of trust; and this appeal must be allowed and the action dismissed.

FLETCHER MOULTON L.J. I am of the same opinion. I have nothing to add.

FARWELL L.J. I am of the same opinion; but I should like to add a few words, because the Vice-Chancellor's judgment has struck me as startling. This is a case of a marriage settlement in which the settlor brings in as security a mortgage of her own choice, made before the marriage, producing 5 per cent. interest, and settles that specific security. The terms of the security are such that it cannot be called in for five years, and on the face of it it simply relates to freehold properties comprised in certain deeds deposited. Now the first thing that struck my mind with a shock was that all these trustees ever retained of which they became trustees by transfer was one undivided moiety of this property. But the Vice-Chancellor has held them liable because they had not got the entirety. I absolutely fail to understand why. The basis of the Vice-Chancellor's judgment is that stated in the passage read by the Master of the Rolls, and I can only say that, so far as I am concerned, I never heard the proposition asserted before, and I do not think it is right. This question of retention of mortgage securities has arisen of late years in more than one case, and there are one or two passages in the judgment of this Court in the case of *In re Chapman* (1) that I should like to refer to. That case was nothing like so strong as the

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PARKER J. present, because it was the case of a testator and the trustees retaining his mortgage securities. To my mind it is a stronger case when a settlor deliberately elects to transfer the particular security of his or her own choice, especially when that security produces 5 per cent. interest and is the only property comprised in the settlement. The Vice-Chancellor would have required the trustees in 1879 to make inquiries, have valuations made and so on, which would undoubtedly have cost money. The only trust fund was this 3000%, which is the subject-matter of the inquiry, and in order to pay for the inquiries it would be necessary to call in the mortgage in order to raise sufficient money to pay the cost. However, that is a detail which I pass by.

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With regard to the duties of trustees of a will which comprises mortgage securities, Lindley L.J. says (1): "The trustees had to consider, not whether they should invest money on a particular security, but whether they ought to get rid of a security of a kind which they were authorized to invest money upon. These two considerations are by no means practically the same." Then, after dealing with the first, he goes on: "A mortgage security is unlike an ordinary investment, inasmuch as it consists of a debt which can be enforced by action, and also of a security which can be realized by sale or foreclosure. A trustee of a mortgage security is, therefore, liable for loss sustained by his wilful default in not obtaining payment in either of these ways. But a trustee is not a surety, nor is he an insurer; he is only liable for some wrong done by himself, and loss of trust money is not per se proof of such wrong." Rigby L.J. says (2): "I think that the misconception in this case has arisen altogether from confounding two totally different questions—the one, what is the duty of trustees who have money in their possession for investment; and the other, what is the duty of trustees with respect to investments for which they are not primarily liable and which in the exercise of their discretion they have chosen not to call in. Those two questions are totally distinct." Then he says: "What is the duty of trustees who get possession of an estate comprising mortgage securities? Of course, if the securities appear prima facie to be good mortgage securities, certainly there is no obligation on the trustees to call them in. It would be a very idle thing to do so for the purpose of investing in other securities, perhaps not more advantageous to the estate. At any rate, no such rule exists. What, then, have the trustees to do? They are to act honestly." And then he deals with that case.

The learned Vice-Chancellor has held here that the trustees have acted honestly, and I confess I fail to see what duty the trustees have broken which would render them liable for the entire loss sustained in this case. Rowley, the mortgagor, was a man in very good repute until the year 1894, and if the trustees had made such inquiries as the learned judge suggests that they ought to have made in 1879, I cannot see that any result would have ensued therefrom which would have led them to alter their course of action in any way whatever.

I think the judgment of the Vice-Chancellor cannot be supported.

(1) [1896] 2 Ch. 773, 774.

(2) [1896] 2 Ch. 781, 782.

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Contract of Service—Agreement to refer Disputes to Foreign Tribunal—Agreement not to give Notice before fixed Date—Previous Determination of Service—Dispute—Action for Injunction—Specific Performance—Implied Contract not to divulge—No Cause shewn for Injunction—Stay of Proceedings.

By an agreement in writing dated June 30, 1905, the defendant, a German subject, agreed with the plaintiffs, a Leipzig firm, to act as their representative in the United Kingdom; to devote all his activity and industry exclusively to the sale of their goods; not to divulge any business matters to any one; and under a money penalty to remain in his position and not to give notice before July 1, 1910, to be three months' notice if then given. The parties agreed to submit themselves in all cases of dispute to the exclusive jurisdiction of the Leipzig Courts and to the exclusive applicability of the German law.

After the expiration of three months' previous notice to determine the agreement, the defendant left the plaintiffs' employment on May 1, 1908, and entered the service of a rival English firm. The plaintiffs then issued the writ in this action for injunctions and other relief. The defendant entered a conditional appearance and applied by summons to stay proceedings on the ground that the disputes should be referred to the Leipzig Court. Thereupon the plaintiffs served notice of motion for (1.) an injunction to restrain the defendant from engaging in any other business than theirs until after July 1, 1910, or until a final order by the Leipzig Court; (2.) an injunction restraining him for a similar period from divulging matters relating to the plaintiffs' business.

On the hearing of the summons and motion :—

Held, (1.) that prima facie the agreement to refer was binding upon the parties and was one upon which the Court would act unless for some good cause the matter ought to be determined otherwise than by the Leipzig Court.

(2.) That the plaintiffs were not entitled to the first injunction asked, on the ground that the stipulation sought to be enforced, although negative in form, was affirmative in substance, and that the Court would not grant an injunction which in effect would compel specific performance of a contract of service.

Davis v. Foreman, [1894] 3 Ch. 654, followed.

(3.) That the plaintiffs were not entitled to the second injunction asked, on the ground that the existence of any implied contract on the part of an employee after the determination of his service not to divulge

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information acquired during it necessarily involved the construction of the written contract which the Court was precluded from construing by the express agreement of the parties; and

(4.) That, therefore, no cause had been shewn why the parties should not be held to their agreement to refer all disputes to the Leipzig Court, and an order must be made on the summons staying proceedings in the action.

ADJOURNED SUMMONS AND MOTION.

By an agreement dated June 30, 1905, and made between the plaintiffs Kirchner & Co., of Leipzig, and the defendant Gruban, a German subject, the defendant was engaged as representative of the plaintiff firm for the United Kingdom, with domicile in London, for the sale of the goods manufactured and sold by the plaintiffs at a remuneration consisting of a fixed salary and certain commissions on sales.

The following material clauses of the agreement are taken from a translation of the German original supplied by the plaintiffs:—

“6. Mr. Gruban agrees to devote all his activity and industry exclusively to the sale of the machines and other articles of the firm Kirchner & Co., Leipzig, not to make gains by another business of any kind, not to divulge any business matters to any one and to follow exactly and conscientiously all instructions and directions of the firm Kirchner & Co., Leipzig”

“7. Mr. Gruban agrees under a penalty of twenty thousand marks to remain in his position and not to give notice before July 1, 1910 (three months). A penalty of twenty thousand marks comes into force if Mr. Gruban by neglect of duty or other permanent abuse of his position of trust shows himself unworthy to remain in his position so that according to the German Commercial Code dismissal is justified. Should such an event take place Kirchner & Co. secure themselves in the first place by the security paid by Mr. Gruban and further by the commissions due or falling due later. Kirchner & Co. agree not to give notice to Mr. Gruban before the 1st day of July 1910 (three months) provided that Mr. Gruban does not give cause for lawful dismissal.”

“12a. The contracting parties submit themselves in all cases of dispute to the exclusive jurisdiction of the Royal Landgericht or of the Amtsgericht at Leipzig, and the German law shall exclusively hold good”

According to the defendant, the more correct and literal translation of the last sentence was, and in fact it is, "and to the exclusive applicability of the German law." The original German sentence ran "und der ausschliesslichen Anwendbarkeit des deutschen Rechtes."

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The agreement contained no restriction against the defendant entering the employment of any rival firm after the termination of his contract with the plaintiffs.

From the date of the agreement the defendant acted as agent for the plaintiff firm, but by the end of 1907 he became desirous of determining his engagement with the plaintiffs, on the ground of certain alleged complaints against them. He gave three months' notice to the plaintiffs of his intention to determine the agreement, and on May 1, 1908, after the expiration of the notice, he left their employment and entered into the employ of a rival English firm with whom in the month of February, 1908, he had entered into a conditional agreement for employment of a similar nature in the event of the determination of his employment with the plaintiffs.

On June 9, 1908, the plaintiffs issued a writ for an injunction to restrain the defendant from engaging in any other business than that of the plaintiffs until after July 1, 1910; an injunction to restrain him from divulging to any one any matters relating to the plaintiffs' business; an account of commissions; damages, incidental relief, and costs.

On June 18 the defendant entered a conditional appearance to the writ, and on June 20 issued a summons asking that the writ of summons and service thereof might be set aside, or in the alternative that all proceedings in this action might be stayed "on the ground that it was agreed between the parties that for any dispute at law the parties agreed to submit to the exclusive competency of the Royal Provincial Court, respectively the county court at Leipzig and to the exclusive applicability of the German law," and for costs.

On August 28 the plaintiffs served a notice of motion for an injunction restraining the defendant from engaging in any business other than that of the plaintiffs until after July 1, 1910, or alternatively until after the matters in dispute between the

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plaintiffs and the defendant had been submitted to the jurisdiction of the Royal Courts of Saxony holden at Leipzig and a final order made in respect of such matters as provided by the agreement; and also an injunction to restrain the defendant from divulging to any one any matters relating to the plaintiffs' business until after July 1, 1910, or, alternatively, until after such final order had been made as aforesaid.

The plaintiffs filed evidence alleging that the defendant had divulged certain matters relating to their business and had solicited their customers.

There was evidence also to the effect that the decision of the Leipzig Court mentioned in clause 12a would not necessarily be final, but that an appeal from it would lie to another Court.

The summons and motion now both came on to be heard together.

Danckwerts, K.C., and *Cozens-Hardy*, for the defendant, the applicant on the summons. Under the terms of the agreement any question in dispute between the parties was to be submitted to the exclusive jurisdiction of the Courts at Leipzig and to the exclusive applicability of the German law. That is binding, and is like a submission to arbitration under the Arbitration Act, 1889, the forum being chosen by the parties: *Law v. Garrett* (1), where it was held that an agreement to submit all disputes to a foreign Court was within s. 11 of the Common Law Procedure Act, 1854. The present case is covered by *Austrian Lloyd Steamship Co. v. Gresham Life Assurance Society* (2), which came under s. 4 of the Arbitration Act, 1889. The Court will therefore stay all proceedings until the question at issue has been determined by the Courts at Leipzig. No case has been made out for the injunction which is claimed by the plaintiffs. The covenant in the agreement is affirmative, and there is no negative stipulation which can be enforced. The whole contract is limited to the duration of the service of the defendant, which has in fact terminated. What is asked is practically to restrain the defendant from terminating his agreement until after July 1, 1910. On the authorities that cannot be enforced: *Whitwood*

(1) (1878) 8 Ch. D. 26.

(2) [1903] 1 K. B. 249.

Chemical Co. v. Hardman (1); *Davis v. Foreman* (2), where the covenant there in question, although negative in form, was held by Kekewich J. to be positive in substance; *Ehrman v. Bartholomew*. (3) If the agreement was lawfully terminated by the defendant there is an end of the application for an injunction. The defendant is willing to undertake to submit himself in all respects to the jurisdiction of the Courts to which by the agreement disputes are to be referred.

P. O. Lawrence, K.C., and *Waggett*, for the motion by the plaintiffs. We are entitled to the injunction claimed. There has been a breach of the negative stipulation not to terminate the service before July 1, 1910. The defendant has also broken the covenant not to divulge any confidential information acquired during his service. The Court has ample jurisdiction to prevent irremediable injury being done and, where injustice would be caused, will refuse to stay the proceedings. An injunction is the only effective remedy under the circumstances of this case. If there was only an affirmative agreement by the defendant to serve, there might be a difficulty, according to the authorities, in interfering by injunction, but here there are negative stipulations as well, and damages are inadequate in a case like this. There is no evidence that the Leipzig Court could grant an injunction, and, moreover, it appears that the decision of the named Courts would not be final, but would be subject to an appeal to other Courts. Further, there is an implied obligation on the defendant after the determination of his contract not to disclose matters which come to his knowledge during his employment; *Robb v. Green* (4); *Lamb v. Evans* (5); *Morison v. Moat*. (6) This obligation is put on two grounds—(1.) an implied contract not to disclose; (2.) a breach of trust or confidence. The obligation exists wherever the contract is made, whether in Germany or elsewhere, and applies to the confidential relationship created by the contract. We prefer to put the implied obligation upon the ground of breach of trust or confidential relationship, and so avoid any question involving the construction

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(1) [1891] 2 Ch. 416.

(2) [1894] 3 Ch. 654.

(3) [1898] 1 Ch. 671.

(4) [1895] 2 Q. B. 315.

(5) [1893] 1 Ch. 218.

(6) (1851) 9 Hare, 241, 255.

EVE J. of the contract; and that a breach of trust is a good ground
 1908 amply appears from the judgments in *Morison v. Moat* (1) and
 KIRCHNER *Robb v. Green* (2), in which case the Court of Appeal expressly
 & Co. said that in equity a breach of faith was enough to warrant an
 v. injunction. There is nothing in these words, even if they are
 GRUBAN. limited to the term of the employment, to oust the application of
 the rule after the defendant's employment has ceased. We submit that on the evidence the defendant has clearly committed a breach of faith and that a case for an injunction has been made out taking this case outside of the decisions in *Law v. Garrett* (3) and *Willesford v. Watson* (4), and that the Court will not stay the action.

EVE J. stated the facts as above set out and continued:—Now I think I may say this as a general rule, that these agreements to refer are often entered into without a full appreciation by the parties of the difficulties which may arise in the contractual relationship brought about by the very contract in which is incorporated the agreement to refer, and without full consideration of the circumstances, or the possible circumstances, which may arise and render the reference necessary. But at the same time it is part of the agreement between the parties, and *prima facie* it is an agreement by which the parties are bound and upon which the Court must act, unless for some good cause there is reason to think that the matter ought to be determined otherwise than by the tribunal to which the parties have deliberately agreed to submit their differences.

On this contract I read this as an agreement to refer all disputes between the parties to the Courts mentioned in the agreement. I am quite satisfied that there is nothing in the suggestion that the decision of those Courts may not be final; it may be that an appeal lies from those Courts to other Courts; but in my mind, assuming that to be so, that does not in the least operate to defeat the agreement into which the parties entered that the differences between them should be referred to those Courts.

(1) 9 Hare, 241, 255.

(2) [1895] 2 Q. B. 315.

(3) 8 Ch. D. 26.

(4) (1871) L. R. 14 Eq. 572.

Prima facie, therefore, it appears to me that the agreement for reference is one which ought to be sustained and to which the parties ought to be held bound, and what really I have to consider in this case is whether there has been made out such a case for either of the injunctions which are claimed as would bring the facts within the class of case referred to by Baggallay L.J. in the judgment in *Law v. Garrett* (1), where he says: "Now, is there anything in the present case to rebut the prima facie case arising out of the 17th article?" That is the prima facie case for reference to the tribunal selected. "It is true that the plaintiff prays for an injunction, and if a case for an injunction was made by the evidence, that would probably be a sufficient reason for refusing to send the matter to arbitration; but no such case is made, indeed it is somewhat difficult to make out from the pleadings or the evidence in respect of what the injunction is asked."

It therefore appears to me that in dealing both with the summons and the motion the proper course to pursue is to consider whether on the motion the plaintiffs have made out a case for both or either of the injunctions which they claim, and if I come to the conclusion that they have not, then it seems to me that prima facie the parties must be held bound by the agreement into which they have entered.

The notice of motion, it will be observed, goes to two wholly distinct matters, and the first injunction claimed is an injunction in terms really to restrain the defendant from determining his engagement with the plaintiffs prior to July 1, 1910.

It is admitted, or conceded, I think I may say, by counsel for the plaintiffs that if this were a mere affirmative agreement by the defendant to serve the plaintiffs until July 1, 1910, and he had refused to continue that service, the Court would not, according to the well-settled practice, interfere by an injunction to compel him to render his services to the plaintiffs down to the date at which in the ordinary course the engagement of service would come to an end. But it is urged here that it is not merely an affirmative covenant, but that there is in this document a negative stipulation which the Court, according

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to the practice, can enforce by restraining the defendant in the terms of the covenant. The negative stipulation is to be found in clause 7 of the agreement. "Mr. Gruban"—that is the defendant—"agrees under a penalty of 20,000 marks to remain in his position and not to give notice before July 1, 1910."

Now it is said that what he has done is a breach of his agreement not to terminate the service before July 1, 1910, and if the matter were entirely free from authority that would be an argument to which I think I should have had to give very much more weight than I am able to do in the present state of the authorities. The question as to the practice of the Court to enforce affirmative covenants of this sort was dealt with and finally disposed of, at any rate for the present, by the case of *Whitwood Chemical Co. v. Hardman* (1), and at a later date the principle upon which that and similar cases had been determined came up for consideration before the late Kekewich J. in the case to which I am about to refer, the case of *Davis v. Foreman*. (2) There the form of the agreement between the employer and the employed was this: "The employer hereby agrees with the manager that he will not, except in the case of misconduct or a breach of this agreement, require the manager to leave his employ and determine this agreement during such period that he shall draw from the said business 15*l.* each and every month." There was an agreement in the negative by the employer that so long as a certain state of things continued to exist he would not give notice to the employee determining the engagement. Kekewich J., having heard all that was to be said on behalf of the plaintiff, who in that case was the employee seeking to restrain the employer from acting upon the notice, gave his judgment, in which he arrives at this conclusion, that though in form the stipulation or agreement is negative in substance, it is really affirmative and positive, that an agreement not to give notice to determine his employment is for all practical purposes an agreement to continue the employment, and having come to that conclusion he says: "Having regard to the principle expounded by the Court of Appeal in *Whitwood Chemical Co. v. Hardman* (1), and recognized again in

(1) [1891] 2 Ch. 416.

(2) [1894] 3 Ch. 654, 655, 657.

the case of *Ryan v. Mutual Tontine Westminster Chambers Association* (1), which is not directly in point, what ought I to do here, in dealing with a covenant or stipulation which, as I have said, though negative in form is positive in substance? There is a clause in the agreement that the employer will not, except in the case of misconduct or a breach of the agreement, require the manager to leave his employ—in other words, give him notice to quit. That is, to my mind, distinctly equivalent to a stipulation by the employer that he will retain the manager in his employ. It is only the form that is negative. If the Court comes to the conclusion that that is really the substance of the agreement (which, being an agreement of service, cannot be specifically enforced), is it right, having regard to the line the authorities have taken, to say that merely because the agreement is negative in form an injunction ought to be granted? To my mind, I should be going distinctly against the last decision in the Court of Appeal if I were to apply the doctrine of *Lumley v. Wagner* (2), which is not to be extended, to a case of this character.”

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It seems to me that every word of that judgment is applicable to the present case, and that I should be disregarding an authority which is certainly binding upon me if I were to hold that merely because Mr. Gruban has entered into a contract not to terminate the engagement before July 1, 1910, I could grant an injunction the effect of which would be as against him to order specific performance of an agreement to continue to serve the plaintiffs down to July 1, 1910. So that on the first part of the motion I hold that, apart from all other considerations, the plaintiffs would not be entitled to the order for which they ask.

With regard to the second part of the motion different and somewhat wider considerations arise. That part of the motion is directed to an injunction to restrain Mr. Gruban, the defendant, from divulging to his present employers or to others confidential information which he has obtained while in the employ of the plaintiffs. I am not desirous at the present moment of saying anything which would in the least affect the tribunal before whom these matters will ultimately come, and more so

(1) [1893] 1 Ch. 116.

(2) (1852) 1 D. M. & G. 604.

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because I have not heard Mr. Danckwerts upon these matters, in which it is suggested the defendant has acted in breach of his duty towards his employers. When I say my judgment proceeds on the assumption that there may have been a breach I must not be understood as expressing any opinion that there has been in fact such a breach. Assuming for the moment, for the purposes of my judgment, that there has been such conduct on the part of the defendant as would in the ordinary course in this Court lead to the Court making an injunction against him until judgment or further order, what ought I to do having regard to the contract between the parties here? I think it is abundantly clear upon the authority of *Robb v. Green* (1) that the real principle upon which the employee is restrained from making use of confidential information which he has gained in the employment of some other person is that there is in the contract of service subsisting between the employer and employee an implied contract on the part of the employee that he will **not**, after the service is determined, use information which he has gained while the service has been subsisting to the detriment of his former employer. It rests, in my opinion, on the implied contract, and it seems to me it goes almost without saying that, in order to arrive at a decision whether a particular contract is to be implied, it becomes absolutely necessary to resort to the contract of service to ascertain what is the meaning of that particular contract, and what implications can properly and legitimately be drawn from that contract of service. That involves as a necessity the construction of the contract. Now it appears to me that in whatever way one looks at it the parties here have agreed that this contract shall be construed according to the German law; and it may be—I do not say it is, but it may be—that, construing this contract according to the law of Germany, the German Court would not deduce from this any implied obligation such as might have been deduced if the contract had to be construed according to English law, or if indeed the only contract between the parties was the contract established by the relationship of master and servant subsisting between them.

(1) [1895] 2 Q. B. 315.

I think that the terms of this clause 12a preclude me from drawing the inference of implied contract as to this contract which the parties have agreed should be construed, not according to the law I am applying, but according to the law of a foreign country.

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In those circumstances, as I say again, without expressing any opinion whatever as to the merits of the disputes between these parties, I do not feel myself warranted in granting an injunction founded upon an implied contract to be deduced from this contract, and accordingly I am not in a position to grant, nor do I think the plaintiffs have made out a case in which I ought to grant, any injunction on the motion.

If that conclusion is right, the further decision seems almost to follow as a matter of course, that there is no cause shewn why the parties should not be held to this agreement, an agreement the effect of which as German subjects I must presume they fully appreciated. For some reasons which they then, no doubt, thought adequate, all parties agreed that disputes should be determined in the country of which they were citizens, and in these circumstances it seems to me that my only duty is to make an order on the summons staying the action. I must order the costs of the motion to be costs in the action, and I must order the plaintiffs to pay the defendant his costs of the action.

The order will be prefaced by the undertaking which Mr. Danckwerts says he is ready to give on behalf of the defendant to submit himself in all respects to the jurisdiction of the Court to which the matter is referred under the agreement.

Solicitors : *Cruesemann & Rouse ; Osborn & Osborn.*

R. M.

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Jan. 13.

In re METCALFE.METCALFE *v.* EARLE.

[1908 M. 2802.]

Will—Construction—Words of Futurity—Gift to Nephews and Nieces—Substitutionary Gift to Children in case any Nephew or Niece “shall die in my lifetime”—Niece dead at date of Will leaving Child.

Testator gave his residuary estate in trust for such of his nephews and nieces “as shall be living at my decease and have attained or shall attain the age of twenty-one years” equally between them if more than one, “Provided always that if any of my nephews or nieces shall die in my lifetime leaving a child or children who shall survive me and attain the age of twenty-one years then and in every such case the last mentioned child or children shall take (and if more than one equally between them) the share which his her or their parents would have taken in my residuary estate if such parents had survived me and attained the age of twenty-one years”:

Held, that the children, who attained twenty-one and survived the testator, of a nephew or niece already dead at the date of the will were entitled to share in the residue.

In re Lambert, [1908] 2 Ch. 117, and *Loring v. Thomas*, (1861) 1 Dr. & Sm. 497, followed.

In re Cope, [1908] 2 Ch. 1, distinguished.

Quære whether a distinction should not be drawn in all such cases between a gift to children and to nephews and nieces, a class much more remote than that of the testator’s own descendants.

ADJOURNED SUMMONS.

By his will the testator gave the residue of his estate to trustees in trust to pay and divide the same equally between and among “such of my nephews and nieces” the sons and daughters of his sisters and brothers therein specifically named “as shall be living at my decease and have attained or shall attain the age of twenty-one years in equal shares and if there shall be only one such nephew or niece the whole to be in trust for such one Provided always that if any of my nephews or nieces shall die in my lifetime leaving a child or children who shall survive me and attain the age of twenty-one years then and in every such case the last mentioned child or children shall take (and if more than one equally between them) the share which his her or their

parents would have taken in my residuary estate if such parents had survived me and attained the age of twenty-one years."

The testator died on December 25, 1907, leaving twenty-six nephews and nieces of the description specified in the will who survived him, including the defendant Elizabeth Earle.

A daughter of one of the testator's named brothers had died in the testator's lifetime and before the date of the will, leaving an only child, the defendant Florence Ann West, who had attained the age of twenty-one years.

Two children of one of the named sisters of the testator were also dead at the date of the will, having left children who survived the testator, of whom three had attained twenty-one and the rest were still infants.

The trustees of the will took out this summons for the determination of the question whether the children of a nephew or niece of the testator who was dead at the date of the will were entitled to any share in the testator's residuary estate.

Gatey, for the plaintiffs.

Timins, for the defendant E. Earle. This will can be construed according to its strict and grammatical meaning, and what was said by Cozens-Hardy M.R. upon the corresponding proviso in the will in *In re Cope* (1) applies equally well to this case, and I submit that "shall attain" must be construed in a future sense and given the natural meaning. When specifying the nephews and nieces who were to take the testator uses the words "as shall have attained or shall attain," and that shews that he differentiated between the past and future and distinguishes this case from *In re Lambert*. (2)

There is no necessity to construe the word "shall" in this will otherwise than in the future sense. The words referring to the children are "attain," not "shall attain," and there is no need to insert the word "shall." This also differentiates the present will from that in *In re Lambert* (2) and renders inapplicable the reasoning of the Vice-Chancellor in *Loring v. Thomas* (3) founded upon the words "shall attain."

(1) [1908] 2 Ch. 1.

(2) [1908] 2 Ch. 117.

(3) 1 Dr. & Sm. 497.

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JOYCE J. [JOYCE J. *Loring v. Thomas* (1) was not in any way overruled by the decision in *Gorringe v. Mahlstedt* (2), which was a very special case and perfectly plain upon the words of that particular will. I have always thought that in a gift of this nature there might be a distinction between a gift to children and to nephews and nieces. In the latter case the question where the nephews and nieces were living at the date of the will and the means which the testator had of knowing the state of the family might, I think, be important.]

Boome, for the defendant F. A. West.

JOYCE J. Prima facie I should have thought that in a case of this kind there was no reason why the children of a nephew or niece dead at the date of the will should be excluded, when the children of a nephew or niece who died after the date of the will but before the death of the testator are admitted. So far as I can see there is no practical difference between the words of the will in this case and in the case of *In re Lambert* (3), with the decision in which I entirely agree.

This is a case where the legatees are nephews and nieces—a class more remote than the descendants of the testator himself—and although what was said by the Court of Appeal in *In re Cope* (4) is entitled to careful consideration, yet there were different clauses and very special circumstances in that case, as appears from the judgment of the Master of the Rolls. There are no such words, however, in this case as were to be found in *In re Cope* (4), and I shall follow the decision in *In re Lambert* (3) and hold that the children who attained twenty-one of a nephew or niece of the testator dead at the date of the will are entitled to share in the residuary estate.

Solicitors: *Hamblins, Grammer & Hamblins*.

(1) 1 Dr. & Sm. 497.

(2) [1907] A. C. 225.

(3) [1908] 2 Ch. 117.

(4) [1908] 2 Ch. 1.

WHITMORES (EDENBRIDGE), LIMITED v. STANFORD.

EVE J.

[1907 W. 3447.]

1908

Watercourse—Artificial Channel—Mill Stream—Riparian Proprietors—Title to Bed of Stream—Easement—Right to Flow of Water—Presumption—Trespass—Injunction—Damages.

Oct. 27 28, 29;
Nov. 3, 4, 5,
17, 18;
Dec. 9.

The plaintiffs were the owners in fee of an ancient tannery situated on either bank of a mill stream, and the defendants were occupiers of an ancient corn mill further down the stream. The channel of the stream was an artificial one, constructed several centuries ago, and passing through the lands of various proprietors before reaching the tannery and the mill. The owners or occupiers of the mill were also in possession of and exercised the sole control over a weir and sluice gates built across the river E. at the point where the mill stream commenced, and they regulated the flow of the water into the mill stream and cleansed the bed and banks from the weir to the tannery. In November, 1907, the defendants cut off the water supply and, entering on the bed of the stream within the plaintiffs' premises, removed therefrom certain pipes by means of which the plaintiffs had been in the habit of obtaining water for their tannery. In an action by the plaintiffs for an injunction to restrain the interference with their right to abstract water, and for trespass and damages:—

Held, upon the facts, and having regard to the conduct of the parties, and especially to the notorious and constant user of the water by the plaintiffs and their predecessors for nearly 250 years, that (1.) the plaintiffs were the owners of the bed of the stream so far as it ran through their land; and (2.) the Court was bound to infer that the mill stream was originally constructed for the mutual benefit of the tanner and the miller, and that the plaintiffs were entitled, under a reservation made or agreement entered into when the channel was constructed, to a right to use the water for all reasonable purposes, not causing any sensible or material injury to the miller.

Baily & Co. v. Clark, Son & Morland, [1902] 1 Ch. 649, followed.

Burrows v. Lang, [1901] 2 Ch. 502, distinguished.

The rule in *Rylands v. Fletcher*, (1868) L. R. 3 H. L. 330, that a person who for his own purposes brings on his land and collects there anything likely to do mischief if it escapes must keep it in at his peril, does not extend to making the owner of land liable for consequences brought about by the collecting and impounding on his land by another of water, or any other dangerous element, not for the purposes of the owner, but for the purposes of that other person.

Semble where water flows through an artificial channel past the lands of several proprietors to serve the purposes of a proprietor lower down,

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the proper grant to presume, in the absence of all evidence as to the conditions upon which the channel was originally made, would be the grant of an easement or right to the running of water; and, *prima facie*, every proprietor of land on the banks of such a channel would be entitled to the moiety of the bed of the channel adjoining his land.

WITNESS ACTION.

The plaintiffs were the owners in fee simple of certain hereditaments and premises known as the Edenbridge Tannery at Edenbridge, in the county of Kent, situate on either bank of and adjoining a stream known as the mill stream. The defendants, Fred Stanford, and Austin Stanford, were the occupiers of a corn mill situate on the same stream below the plaintiffs' premises. On November 21, 1907, the defendants drew off the water from the mill stream and, entering upon the bed thereof, cut off and removed therefrom to other parts of the plaintiffs' premises certain pipes and other contrivances by means of which the plaintiffs had been in the habit of abstracting water from the stream for use in their premises. Thereupon, on November 25, 1907, the plaintiffs commenced this action and claimed an injunction to restrain the defendants from interfering with the right of the plaintiffs to abstract water from the stream, and damages, including 25*l.* 5*s.* 9*d.* special damage, for the acts of trespass. There was no documentary evidence from which it was possible to ascertain the rights of the parties to (1.) the bed and banks of the mill stream, (2.) the devices by which the water was allowed to flow into or was withdrawn from the channel, and (3.) the water flowing therein; and these rights had to be determined from inferences drawn from the history of the stream, the tannery, and the mill, and from the acts of the litigating parties and their predecessors in title. The following is a summary of the main facts found by the judge to be admitted or proved.

The channel of the mill stream was an artificial cut on the slope of a hill, and about half a mile in length. It traversed the lands of various proprietors before reaching the plaintiffs' premises, and there was no evidence to shew that any of these lands situate above the plaintiffs' premises were ever vested in the owners either of the tannery or the mill. No evidence was forthcoming

as to the date when and the circumstances under which the channel was cut, but it was several centuries old and must have involved substantial expenditure of time and money. The three sources from which the cut derived water were (1.) the river Eden, (2.) the Kent Brook, which flowed into the cut about sixty yards from its commencement, and (3.) the overflow from a pond, which was of no real importance. The water of the river Eden was diverted into the cut by means of a substantial weir, built across the bed of the river, wherein were three movable sluices or doors which could be raised or lowered according as it was desired to let the water pass along its natural bed or to divert it into the mill channel. The mechanism by which the sluices and doors were controlled was covered in by a weir-house built over the centre of the weir, and the whole was under the sole control of the owners of the mill, who were also the owners of the meadow or close in which these works stood. The water passing down the mill stream rejoined the river Eden below the defendants' corn mill. For at least 235 years a tanyard had been in existence on part of the premises now belonging to the plaintiffs. By a deed of April, 1673, a messuage with the garden and tanyard at Edenbridge was conveyed to one John Cruttenden "together with all ways, waters, timbers, trees, easements, rents, profits, commodities, and appurtenances whatsoever to the said messuage or tenement, tanyard, and premises belonging or in anywise appertaining." The premises were similarly described in subsequent deeds and had been used continuously as a tannery ever since.

The remaining parts of the plaintiffs' premises, situated on both sides of the mill stream, were acquired between 1853 and 1903. There was evidence that at some date before living memory a predecessor of the plaintiffs had laid in the bed of the stream a perforated wooden conduit to convey water to the tannery. Two pokes, or soaks, formed by driving piles into the bed of the stream and used for soaking hides, had also been constructed. These were discontinued in 1890. In 1877 and subsequently, other pipes with screening boxes and two suction pipes were placed in the bed of the stream by the plaintiffs. Five bridges were built at various times on the banks of the mill stream to connect the

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two portions of the plaintiffs' premises. One of the bridges, which was built on the level of the ground, hindered the defendants, as they alleged, in cleansing the bed of the stream and also interfered with the flow of water. This bridge the defendants threatened to remove.

The defendants' mill was probably as old as the tannery. The earliest title deed produced was a release and conveyance dated January 3, 1765, in which all that messuage or tenement, with the corn water mill and certain lands, were conveyed, "together with all ways, waters, watercourses, paths, passages, streams, banks, mounds, dams, wares, floodgates, pens, penstocks, fishings, fisheries, profits, commons, commodities, and appurtenances whatsoever to the said messuage or tenement, mill, lands, and premises belonging or in anywise appertaining." The owner of the mill, by himself or his under-tenants, had at all times borne all the expenses of keeping the weir and sluices in repair. All ordinary cleansing and scouring of the bed of the stream was done by the miller, and he also kept in repair the banks from the weir to the tannery premises. When the defendants became tenants of the mill by an agreement dated November 15, 1897, their obligations in respect of scouring and cleansing were limited in terms to a covenant "to brush and scour the river" (that is, the mill stream) "from tanyard to Kent Brook, yearly."

With regard to the use of the water of the stream by the tanner, during the whole period of living memory the owner of the tannery had abstracted water from the stream, and down to 1875 the bulk of the water abstracted was in due course returned to the stream above the mill premises, but since that date, by orders of the local sanitary authority, it had been discharged into the sewers. A considerable amount of water was abstracted from the stream by means of two pipes with screening boxes and by other suction pipes with pumps attached for the purposes of the tannery, but the judge was satisfied on the evidence that the abstraction of water by the plaintiffs had not in the past, and in the ordinary course of events would not in the future have, any sensible effect on the working of the defendants' mill; and, further, that the presence in the stream

of the suction and other pipes and screening boxes did not and could not materially, if at all, arrest the flow of water to the mill wheel.

The miller used the water for the purposes of his mill, and whenever repairs or other work at the mill wheel rendered it necessary he drew off the water and left the channel empty, and this without any leave from or notice to the tanner (except in the time of the father and uncle of the defendants, from 1873 to 1893). The miller also prevented the abstraction of water from the stream by others. There had never been any attempt by the miller to restrain the user of the water by the tanner until this action was instituted, although such user was known to the defendants and their predecessors.

The main issues raised in the action were—(1.) in whom was vested the bed of the stream so far as it lay within the area of the plaintiffs' premises, and (2.) had the plaintiffs a right to abstract water from the stream for use in the tannery?

P. O. Lawrence, K.C., Jessel, K.C., and C. Hartree, for the plaintiffs. This case is covered by the decision in *Baily & Co. v. Clark, Son & Morland* (1), which is very similar in its circumstances. The proper presumption to be made here is that the channel was originally constructed for the joint purposes of the miller and the tanner, and that the plaintiffs as riparian proprietors have the same rights to the bed of the stream and to the user of the water as they would have had if the mill stream had been a natural watercourse. We admit that the user by the plaintiffs must be reasonable and not such as to inflict injury upon the defendants. On the evidence, the user was reasonable and inflicted no sensible injury on the miller. The plaintiffs are therefore entitled to an easement of the right to use the water of the mill stream, and, as they are also the owners of the bed of the stream within the area of their own premises, they are entitled to damages for trespass.

Upjohn, K.C., and Gatey, for the defendants. We rely on the decision in *Burrows v. Lang* (2) in support of the following propositions: First, that the alleged easement involved the miller

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(1) [1902] 1 Ch. 649.

(2) [1901] 2 Ch. 502.

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in looking after the intake and the working of the intake, and that, in all the circumstances of this case, there cannot be presumed or implied a grant entitling the plaintiffs to the flow of water down the stream; and, further, that if there was no obligation on the miller to send the water down, then there was no right in the owner of the tannery to take the water when it came down. In other words, there was no easement, but only a precarious user in respect of the water, whoever was the owner of the bed of the stream. If the defendants establish their title to the whole bed of the stream, then this case comes directly within the decision in *Burrows v. Lang*. (1) But if they do not, then the questions arise, Is this a case in which easements can be granted? Is it a case where covenants and cross-covenants, justifying what has been done, can be implied? Can the obligation on the miller be the subject-matter of a covenant which, both as to burden and benefit, shall run with the land? We submit that, even assuming that the plaintiffs' user of the water has gone back as long as is suggested, still there is no legal origin for it, because it is a right against the miller, and neither by the law of easement nor of covenants running with the land can there be a right against the miller to do an act for the benefit of the tannery. The burden of positive covenants does not run with the land: 1 *Smith's Leading Cases*, 11th ed. p. 84; *Bailey v. Stephens* (2); *Dennett v. Atherton* (3); *Keppell v. Bailey* (4); *Austerberry v. Oldham Corporation* (5); *Haywood v. Brunswick Permanent Benefit Building Society* (6); *Tulk v. Moxhay*. (7) The Court will not infer any arrangement involving a covenant to keep the weir in repair and imposing a personal obligation upon the covenantor. The doing of some act by the owner of the servient tenement is inconsistent with the nature of an easement: *Burrows v. Lang*. (1) That case is an authority against the presumption that the channel was made for the joint purposes of the mill and the tannery. We submit that it was made for the sole purposes of the mill, and that the enjoyment

(1) [1901] 2 Ch. 502.

(4) (1834) 2 My. & K. 517, 535.

(2) (1862) 12 C. B. (N.S.) 91, 112.

(5) (1885) 29 Ch. D. 750, 775.

(3) (1872) L. R. 7 Q. B. 316.

(6) (1881) 8 Q. B. D. 403.

(7) (1848) 2 Ph. 774.

of the water by the tannery has been permissive, temporary, and precarious. The miller is entitled to say that he can take the sluice gates away because he desires to stop the mill. A permissive user is no foundation for the presumption of a grant: per FitzGibbon L.J. in *Hanna v. Pollock* (1); and the fact that the plaintiffs have enjoyed the right for a long time will not avail them in the circumstances: *Arkuright v. Gell* (2); *Wood v. Waud* (3); *Greatrex v. Hayward* (4); *Mason v. Shrewsbury and Hereford Ry. Co.* (5) *Baily & Co. v. Clark, Son & Morland* (6) has nothing to do with this class of case. In that case it was common ground that the law of easements applied, and the Lords Justices regarded the stream as a natural watercourse and decided the right of the parties on that footing. Whatever view the Court takes as to the title to the bed of the stream, the plaintiffs fail in their claim to an easement to the flow of the stream past them. With regard to the trespass the claim is trivial.

In the case of an artificial watercourse there is no presumption as to the ownership of the bed, and the evidence of acts of ownership exercised over one part of the bed is evidence of ownership over the whole. The defendants have therefore established their title to the bed, and the tanner is the trespasser. Then, lastly, in the event of the miller giving up the working of the mill and yet continuing the impounding of the water for the purposes of the tannery, the miller, as owner of the weir and sluices, would be held liable for damage occasioned to others in consequence of any overflow: *Rylands v. Fletcher* (7); *R. H. Buckley & Sons, Ltd. v. N. Buckley & Sons.* (8) That would be imposing a greater burden on the miller than on the tanner and should prevent the Court from making the presumption that the channel was cut for the mutual benefit of both.

P. O. Lawrence, K.C., in reply. The law laid down in the cases cited for the defendants is not disputed. The cases may be divided into three groups. *Burrows v. Lang* (9) is an example of

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(2) (1839) 5 M. & W. 203.

(3) (1849) 3 Ex. 748.

(4) (1853) 8 Ex. 291.

(5) (1871) L. R. 6 Q. B. 578.

(6) [1902] 1 Ch. 649.

(7) L. R. 3 H. L. 330.

(8) [1898] 2 Q. B. 608.

(9) [1901] 2 Ch. 502.

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the first, but there all the land over which the channel ran was in the possession and ownership of the miller. Here both the tanner and the miller are owners of a dominant tenement and there is a joint easement in both. *Watts v. Kelson* (1) is a somewhat similar case of a presumption being made such as we suggest.

Of the second group of cases *Arkwright v. Gell* (2) is an example of an artificial watercourse made for a temporary purpose, and there are many other cases of a similar nature, such as *Wood v. Waud* (3), *Greatrex v. Hayward* (4), and *Hanna v. Pollock* (5), which do not touch the present.

Of the third group of cases *Mason v. Shrewsbury and Hereford Ry. Co.* (6) is the leading case, but that is inapplicable to the case of joint owners of an easement along an artificial cut. The present case is really indistinguishable from *Baily & Co. v. Clark, Son & Morland* (7), and a similar inference to that asked here was drawn in the case of *Nuttall v. Bracewell*. (8) We only claim the right to take water so long as it does not injuriously affect the miller. That is the measure of the easement.

As to the argument founded on *Rylands v. Fletcher* (9) and *R. H. Buckley & Sons, Ltd. v. N. Buckley & Sons* (10), one answer is that directly the easement is abandoned by the defendant he ceases to be liable, and it does not come within the principle of those cases. Further, there is no case which has decided that a riparian proprietor is liable in the case of an artificial watercourse flooding the lands of others. The other cases were those of preventible acts of the defendant. There is no suggestion of the mill being abandoned, and no damage has occurred up to this time.

Dec. 9. EVE J. (after stating the facts and the two issues). With regard to the title to the bed of the stream, I should have been prepared to hold that in cases where an artificial channel or

(1) (1871) L. R. 6 Ch. 166.

(2) 5 M. & W. 203.

(3) 3 Ex. 748.

(4) 8 Ex. 291.

(5) [1898] 2 I. R. 532; on appeal,

[1900] 2 I. R. 664.

(6) L. R. 6 Q. B. 578.

(7) [1902] 1 Ch. 649.

(8) (1866) L. R. 2 Ex. 1.

(9) L. R. 3 H. L. 330.

(10) [1898] 2 Q. B. 608.

cut passes by or through the lands of several proprietors, and water flows therein to serve the purposes of a lower proprietor, the proper grant to presume, in the absence of all evidence as to the terms and conditions upon which the channel was originally made, is the grant of a watercourse—that is, of the easement or right to the running of water—and that, under such circumstances, *prima facie* every proprietor of land on the banks of such a channel or cut is entitled to that moiety of the bed of the channel which adjoins to his land.

But it is really not necessary for me to fall back on such a presumption in this case. The conduct of the miller throughout, in relation to the bed and banks of the channel, has been as wholly consistent with his having an easement for the flow of the water, and nothing more, as the conduct throughout of the tanner has been wholly inconsistent with his having parted with the strip of land over which the water flows. I cannot accept the suggestion that the laying of the pipes in the bed, the construction of the pokes, and the building of the first bridge, are referable to regrants by the miller of rights in the nature of easements over soil already acquired by him.

In my opinion the plaintiffs are the owners of the bed of the stream so far as it runs through their land, and upon this footing they have committed no trespass in the construction of the various bridges, or the laying of the pipes, or the erection of the screening boxes. I have already held that neither the pipes nor the screening boxes interfere with the flow of the water, and that the last bridge erected does not impede the defendants in their work of cleansing and scouring the channel, and I hold the same opinion with regard to the pipes, including the two suction pipes, stretching across the stream.

I now pass to consider what, if any, rights the plaintiffs have to abstract water from the stream.

Am I to infer, as Mr. Upjohn urges I should do, that the user of the water by the tanner has throughout been permissive, or are the facts of such a nature as to lead irresistibly to the conclusion that the joint user of the water by the tanner and the miller was one at least of the conditions under which the construction of the channel had its origin?

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I think these are the two alternatives between which I have to elect, for Mr. Upjohn's argument has satisfied me that if the watercourse was made solely for the purposes of the mill, I ought to hold such purposes to be temporary, and that, in accordance with the decisions in *Arkwright v. Gell* (1), *Wood v. Waud* (2), and *Burrows v. Lang* (3), I could not presume any grant by which the grantor bound himself to continue the flow of water for all time, irrespective of the consideration whether the purposes for which the watercourse was originally made were still subsisting, and regardless of the wholly uncertain burden which he might thereby be undertaking. And, indeed, even if such a grant were presumed, I think it is clear, upon the authorities, that the burden of such covenants could not be held to run with the land: see *Bailey v. Stephens* (4), *Dennett v. Atherton* (5), *Austerberry v. Oldham Corporation* (6), and in particular *Keppell v. Bailey*. (7)

Further, I think *Burrows v. Lang* (3) establishes this proposition, that if the plaintiffs have no right to have the flow continued, they cannot claim as an easement the right to abstract water, if and when it is flowing in the stream. Farwell J. deals with such a claim where he says (8): "To my mind that is a claim which is inconsistent with the very idea of the nature of an easement. As stated by Lord Coke, Co. Litt. 113b, quoting Bracton 222b, the possession or seisin necessary for an easement must be *nec per vim nec clam nec precario*. What is precarious? That which depends, not on right, but on the will of another person. As Bracton, 221a, puts it: '*Si autem precaria fuerit et de gratia, quæ tempestive revocari possit et intempestive, ex longo tempore non acquiritur jus*.' That is to say, if the servient owner can tempestive aut intempestive—whether the dominant owner likes it or not—put a stop to the easement, there is really no easement, because the very idea of right which necessarily underlies an easement is negatived." I think, therefore, the plaintiffs' user must be either of a permissive character, or it must be founded on a presumption that the watercourse was not

(1) 5 M. & W. 203.

(2) 3 Ex. 748.

(3) [1901] 2 Ch. 502.

(4) 12 C. B. (N.S.) 91, 112.

(5) L. R. 7 Q. B. 316.

(6) 29 Ch. D. 750, 775.

(7) 2 My. & K. 517, 535, 536.

(8) [1901] 2 Ch. 510.

constructed originally for the purposes of the mill alone, but for the joint purposes of the tanner and the miller. It has been strenuously argued that *Burrows v. Lang* (1) is an authority against my making any such presumption, and as strenuously argued on the other side that *Baily & Co. v. Clark, Son & Morland* (2) shews that, in such circumstances as exist in this case, it is the only possible presumption to make. I do not think that *Burrows v. Lang* (1) upon this point does more than negative such a presumption in a case where water is conducted by a man entirely over his own land, but in a course which makes the water accessible to his neighbour. In cases where the water required by the one owner passes to him over the land of another owner the learned judge distinctly recognizes that a presumption may arise that there was an arrangement that the flow of the water should be for the mutual benefit of both. Then it is further urged that, even in cases falling within the latter class, the Court ought not to make the presumption, if the result of so doing may be to throw upon one of the two for whose benefit the watercourse is presumed to have been made responsibility for acts done solely for the purposes of the other. It is argued that, if, in the present case, the use of the water for the mill should be discontinued, and its impounding and flow for the purposes of the tannery be continued, the miller, as the owner and occupier of the land whereon the impounding takes place, might still be made liable for any damage which might be occasioned to others consequent upon such impounding, and in support of this argument *Rylands v. Fletcher* (3) and *R. H. Buckley & Sons, Ltd. v. N. Buckley & Sons* (4) are cited. I think this argument involves a rule of law of wider application than the rule which was applied in those cases, and a rule for the existence of which those cases are no authority.

The rule there applied is thus stated in *Rylands v. Fletcher* (5): "We think that the true rule of law is, that the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in

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(4) [1898] 2 Q. B. 608.

(5) L. R. 3 H. L. 339.

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at his peril ; and if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape. He can excuse himself by shewing that the escape was owing to the plaintiff's default ; or, perhaps, that the escape was the consequence of vis major, or the act of God." The rule so stated does not appear to me to extend to make the owner of land liable for consequences brought about by the collecting and impounding on his land, by another, of water, or any other dangerous element, not for the purposes of the owner of the land, but for the purposes of such other ; and if the presumption of construction for mutual benefit ought otherwise to be made, I do not think I ought to refuse to make it merely because it may under certain circumstances impose a greater burden on one of the joint users than may have been contemplated or foreseen when the arrangement is presumed to have been made. Considering all the facts of this case ; bearing in mind the great antiquity of this watercourse, of the tannery, and of the mill ; remembering that the tanyard and the mill formed the terminus to which the diverted water was led, and together represent the only persons who have ever asserted a right to abstract or use the diverted water in any way ; and above all emphasizing a user by the tannery for a period which does not fall far short of 250 years, and a user which has been open, notorious, and, as far as I can judge, constant and continuous, I cannot bring myself to believe that the tanner has throughout had nothing more to rely upon than the forbearance and good will of the miller, and that he was content to grant to the miller a right to conduct the water in part over the tanyard premises, without reserving to himself a right to withdraw from the flowing stream such water as was essential for the very existence of the tannery business. I cannot reconcile my mind to the conclusion that when this watercourse was made the tanner conceded to the miller the right to every drop of water which passed to and through the tanyard. The whole history of the water is inconsistent with such an arrangement ; and in considering the acts of the plaintiffs and their predecessors in relation to the stream I am bound prima facie to treat them as having been done in the exercise of a legal right, rather than as having been done without

any legal title. I think in all the circumstances I am bound to infer that the mill stream was originally constructed for the mutual benefit of the tanner and the miller, and that the plaintiffs, as owners and occupiers of the tannery, are entitled, under a reservation made or an agreement entered into when the channel was constructed, to the enjoyment of a reasonable use of the water therein, or, putting it in other words, to a right to use the water for all reasonable purposes, that is, for all purposes not causing any sensible or material injury to the miller. Holding, as I have done, that the use by the plaintiffs has hitherto been reasonable within the above definition of the word, I must give judgment for the plaintiffs, and grant a perpetual injunction restraining the defendants from in any way preventing or hindering the plaintiffs from having the full use and enjoyment of the mill stream, and the water thereof, in the manner in which the same was used and enjoyed prior to the month of November, 1907. The defendants must pay to the plaintiffs the sum of 25*l.* 5*s.* 9*d.* damages and must pay the costs of the action.

Solicitors: *Sharpe, Pritchard & Co., for W. C. Cripps, Son & Daish, Tunbridge Wells; Loughborough, Gedge & Co.*

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Jan. 11.

In re GOODALL'S SETTLEMENT.

FANE *v.* GOODALL.

[1908 G. 2239.]

Settled Land—Trust for Sale that may never arise—Settled Land Act, 1882
(45 & 46 Vict. c. 38), s. 63.

A trust for sale that may never arise is not a "trust or direction for sale" within s. 63 of the Settled Land Act, 1882.

In re Horne's Settled Estate, (1888) 39 Ch. D. 84, applied.

ORIGINATING SUMMONS.

By an ante-nuptial conveyance dated May 1, 1876, and made between the husband of the first part, the wife of the second part, and trustees of the third part, the husband granted certain freehold lands in Ireland unto and to the use of the trustees and their heirs upon trust that the trustees should "at the request in writing" of the husband during his life and after his death at the discretion of the trustees for the time being sell the said lands and should stand possessed of the net proceeds and also the rents and profits of the said lands or of the unsold part thereof for the time being upon the trusts declared by the settlement of even date next below stated.

By a settlement of even date with and made between the same parties as the above conveyance it was declared that the trustees should stand possessed of the net proceeds of sale (thereinafter called the trust fund) and the annual produce thereof upon trust to pay the annual produce unto or permit the same to be received by the husband during his life and after his decease unto or by the wife during her life, and after the decease of the survivor the trustees should stand possessed of the trust fund and the annual produce thereof in trust for such of the children and remoter issue of the marriage as the husband should by deed or will appoint, and in default of or subject to any such appointment in trust for the children of the marriage who being sons should attain the age of twenty-one or being daughters should attain

that age or marry with the consent of their guardians in equal shares.

It was provided that no appointee under the aforesaid power should take a vested interest otherwise than by way of advancement unless he or she attained the age of twenty-one or in the case of a female married with such consent as aforesaid. The settlement contained advancement, maintenance, and accumulation clauses and an ultimate trust for the husband in default of children or appointees taking vested interests.

It was further provided that if the husband should in any deed or will by which he exercised the power of appointment therein-before given to him make any declaration or direction that the lands comprised in the conveyance should not be sold under the trust in that behalf contained in that conveyance the same trust for sale should not be exercised and the same lands should go and belong to the persons to whom or in whose favour the same should be appointed in the nature of real estate to all intents and purposes.

It was also declared that until all the said lands should have been sold in pursuance of the aforesaid trust in that behalf the trustees should pay or apply the net rents and profits of the same lands or of so much thereof as for the time being should not have been sold to the persons for the purposes and in the manner to whom and for and in which the annual produce of the net proceeds of sale would be payable under the trusts therein contained if the sale were then actually made.

In March, 1905, the husband entered into numerous agreements with his tenants and instituted proceedings under the Irish Land Acts for the sale of part of the lands to them. The purchase-money was 12,272*l.*, and the 12 per cent. bonus payable under s. 48 of the Irish Land Act, 1903 (3 Edw. 7, c. 37), amounted to 1472*l.* The trustees, who had received no written request to sell, were aware of but took no part in the sale and were not represented in the Irish proceedings.

In accordance with the practice of the Irish Land Commission Court the title was first submitted to counsel, who certified that the husband was a person having power to sell. The title was then investigated by the official "examiner," who

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issued certain "rulings on title and directions for searches." By ruling 8 the examiner raised the question whether having regard to the trust for sale the husband was entitled to sell without an order from the Chancery Division in Ireland under s. 7 of the Settled Land Act, 1884 (47 & 48 Vict. c. 18), and suggested that the question should be referred to the decision of the Judicial Commissioner before the purchase-money was paid to the credit of the estate.

The question was of some importance, as if the sale was made by the husband as life tenant or a person having the powers of a life tenant under the Settled Land Acts he was entitled to retain the bonus under s. 3 of the Irish Land Act, 1904 (4 Edw. 7, c. 34). It appeared from the allocation schedule that a copy of ruling 8 was sent to the proper office of the Estate Commissioners on June 18, 1908, but it was accidentally overlooked, and the purchase-money was paid to the credit of the estate on June 25, 1908. The husband had not applied for leave, as he considered that there was no trust for sale within s. 63 of the Settled Land Act, 1882, and that he could sell as a limited owner under s. 58, sub-s. 1, clause ix. The purchase-money was allocated and ordered to be paid to the trustees, but the Judicial Commissioner declined to order the bonus to be paid to the husband in the absence of the trustees and proposed to leave that point to the judge, having regard to ruling 8. As this would have delayed the proceedings till after the Long Vacation, the husband assented to the bonus being paid to the trustees, and it was paid to them accordingly by the order of the Judicial Commissioner and was on deposit in their names in a London bank. The purchase was completed by vesting order. The allocation of the bonus was thus disposed of as far as the Irish Land Commission Court or any jurisdiction of any Irish Court in the said proceedings was concerned, and no proceeding was now pending in the Irish Courts as to the destination of the bonus. That could only be determined in Ireland by fresh proceedings in the Irish Chancery Division.

It was admitted that by consenting to this payment the husband had not in any way agreed to treat the bonus as capital, but had merely allowed the whole money to be paid to the

trustees as a matter of convenience and to avoid delay so that they might afterwards obtain directions on the point.

This summons was issued to determine whether the bonus belonged to the husband or whether it formed part of the capital of the trust fund. The parties were all in England.

G. D. Pepys, for the trustees. There is no difficulty about the jurisdiction, as the money and the parties are all in England. The bonus was paid out of the Land Purchase Aid Fund created by s. 47 of the Irish Land Act, 1903. Sect. 48 provides that a bonus of 12 per cent. on the purchase-money is to be paid to the vendor. In consequence of the decision in *In re Marquis of Ely's Estate* (1), where the bonus was held to be capital, the Irish Land Act, 1904, was passed. Sect. 3 provides that where the vendor is a life tenant or a person having the powers of a life tenant under the Settled Land Acts the bonus shall (subject to immaterial exceptions) be retained by him as his own proper moneys for his own use and benefit, free and discharged from all claims upon the lands sold or the purchase-money thereof and from any trust affecting the same.

If the husband's power of sale depended on s. 63 of the Settled Land Act, 1882, he cannot be said to have sold as life tenant, as the leave of the Court was not obtained. In that case the sale must be taken to have been effected under the Irish Land Acts simply and the husband is not entitled to the bonus. If s. 63 does not apply and he sold under s. 58, sub-s. 1, clause ix., he is entitled to the bonus.

If the sale is beneficial to the estate, the Irish Courts give leave to sell under s. 63, although that enables the life tenant to claim the bonus: *In re Iever's Settlements* (2); *In re Tuthill*. (3) In *In re Babington's Estate* (4) leave was not necessary, as there was only a power of sale.

Edward Ford, for the husband. Sect. 63 does not apply, as the trust for sale may never arise. In the first place, during the husband's life it only arises on his request in writing, which has

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(1) [1904] 1 I. R. 66.

(2) [1904] 1 I. R. 492.

(3) [1907] 1 I. R. 305.

(4) (1905) 39 Ir. L. T. 224 (Inner Temple, Middle Temple, Gray's Inn, and Probate Libraries).

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not been given, and, secondly, the husband may put an end to it. That is not a trust for sale within s. 63: *In re Horne's Settled Estate*. (1)

[SWINFEN EADY J. In that case the trust for sale was definitely postponed for twenty-one years. Here it might have arisen at once.]

That is so, but the point is that it has not arisen and may be put an end to before it arises.

[SWINFEN EADY J. In *In re Iever's Settlements* (2), *In re Tuthill* (3), and *In re Babington's Estate* (4), it was assumed that a trust for sale upon request was within s. 63.]

The present point was not raised and cannot be taken as decided, and in this case there is the additional power to put an end to the trust for sale, so that it may not arise even on the husband's death. The husband had clearly power to sell under s. 58, sub-s. 1, clause ix.

Ronald Walker, for the remaindermen. One of the remaindermen's shares is settled, so they cannot consent to the husband retaining the bonus. But having regard to the fact that during the husband's life the trust for sale only arises on his request and may be put an end to on an appointment, I cannot distinguish *In re Horne's Settled Estate* (1) or contend that the case is within s. 63 and not within s. 58, sub-s. 1, clause ix.

SWINFEN EADY J., after stating the facts and referring to the dispositions of the conveyance and settlement, continued:—The question is whether the dispositions of the conveyance and settlement render the land "subject to a trust or direction for sale" within s. 63 of the Settled Land Act, 1882. If so, it would be necessary for the husband to obtain the leave of the Court under s. 7 of the Settled Land Act, 1884, before he could exercise the power of sale under s. 63.

This leave he has not obtained or applied for, as he has throughout contended that it is unnecessary. The question therefore really is whether the case is within s. 63. It is to be observed that the trust for sale in this case is one that may never arise,

(1) 39 Ch. D. 84.

(2) [1904] 1 I. R. 492.

(3) [1907] 1 I. R. 305.

(4) 39 Ir. L. T. 224.

because during the husband's life the trustees are only directed to sell at his request in writing, a request which he may not give, and he is also empowered on making an appointment under the settlement to direct that the lands shall not be sold under the trust for sale, in which case the trust for sale is not to be exercised, but the lands are to go to the appointees as real estate.

I am therefore bound to construe the conveyance and settlement as documents under which the trust for sale may never arise.

In those circumstances the case is governed by *In re Horne's Settled Estate*. (1) In that case the will contained a trust for sale with a proviso that the property was not to be sold until the expiration of twenty-one years from the date of the will. North J. held that this was not a "trust or direction for sale" within s. 63. On appeal, Cotton L.J. did not differ from North J., but based his decision on the ground that the applicants, who were only entitled contingently on attaining twenty-five, could not be considered life tenants under s. 63 because they were not beneficially entitled to the income until sale. Fry L.J. said (2): "I am very much inclined to adopt the view taken by Mr. Justice North, that s. 63 does not apply, because the trust for sale is postponed. The trust is postponed for twenty-one years, and it is quite open to possibility that the trust may fail, if, for instance, all the applicants should die under the age of twenty-five. I do not think that it is a trust for sale under the section. I also agree with what has been said by the Lord Justice that there is no one at present beneficially entitled to the income, within the latter part of the section." Lopes L.J. said: "I am of the same opinion. I should have doubts whether this case could be brought within the earlier part of that section. I am clear that it does not come within the latter part."

In this case, therefore, as the trust for sale may never arise, the land was not "subject to a trust or direction for sale" within s. 63, and no application for leave to exercise the powers of that section was necessary under s. 7 of the Settled Land Act, 1884. The husband was entitled to the income of the land under a trust or direction for payment of the rents and profits to him

(1) 39 Ch. D. 84.

(2) 39 Ch. D. 91.

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during his life or until sale, and had therefore the powers of a life tenant under s. 58, sub-s. 1, clause ix.

The husband, therefore, being the vendor and a person having the powers of a life tenant, is entitled under s. 3 of the Irish Land Act, 1904, to retain the bonus as his own proper moneys for his own use and benefit, free and discharged from all claims upon the lands sold or the purchase-money thereof and from any trust affecting the same.

Solicitors : *Surman & Quekett.*

G. R. A.

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Jan. 19.

In re DUNDERLAND IRON ORE COMPANY, LIMITED.

[00419 of 1908.]

Company—Winding up—Petition—Creditor—Debenture Stockholder—Unpaid Interest—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 82.

A trust deed for securing debenture stock, made between the company and the trustees for the stockholders, provided that the company would pay the half-yearly interest direct to the stockholders, whose receipt should be a good discharge to the trustees and the company. The certificate delivered to each stockholder stated the rate of interest and dates of payment, and certified that the stockholder was the registered holder of the stock which "is issued subject to the provisions contained" in the trust deed, but it did not contain any direct covenant with the stockholder to pay him the interest:—

Held, that stockholders whose interest was in arrear were not entitled to present a winding-up petition as creditors under s. 82 of the Companies Act, 1862.

PETITION.

The above company was incorporated on April 22, 1902, with a capital of 2,000,000*l.* divided into 200,000 six per cent. cumulative preference shares of 5*l.* each and 200,000 ordinary shares of 5*l.* each, all issued and paid or credited as paid.

The chief object of the company was the acquisition and working of iron ore mining rights in Norway.

In 1904 the company created an issue of first charge debenture stock bearing interest at 6 per cent. per annum, payable

March 1 and September 1, limited in the first instance to 200,000*l.*, but subsequently increased to 500,000*l.*

This first charge debenture stock was secured by a trust deed dated November 29, 1904, and made between the company and the trustees. This trust deed provided as follows :

Clause 1. “. . . . ‘The stock’ means the amount (irrespective of discount allowed or premium in the case of stock issued at a premium) of stock issued by the company upon the terms of being secured by this deed. ‘The stockholders’ means the several persons for the time being entered in the register hereinafter mentioned as holders of the stock”

Clause 2. “The stockholders are to be regarded as the beneficial owners of their respective shares of the stock.”

Clause 4. “The stock is limited in the first instance to 200,000*l.* but the company is to be at liberty from time to time or at any time to create and issue further stock ranking *pari passu* with the said 200,000*l.* stock and entitled to participate therewith in the benefit hereof up to an amount not exceeding in the whole with the said 200,000*l.* the amount of 500,000*l.*”

Clause 5. “As and when the stock or any part thereof ought to be redeemed or paid off in accordance with the provisions hereof the company will pay to the stockholders or those whose stock ought to be redeemed or paid off the full nominal amount of the stock held by them respectively with such premiums (if any) as shall be payable in respect thereof and such payment shall operate in satisfaction of the amount of the stock so redeemed or paid off and in the meantime until the stock is redeemed or paid off the company shall pay to the stockholders interest on the stock held by them respectively at the rate of 6 per centum per annum and such interest shall be paid by equal half-yearly payments on every first day of March and first day of September.”

Clause 6. “The stock shall be held subject to the conditions set forth in the first schedule hereto and such conditions shall be binding on the company and the stockholders and all persons claiming through them respectively.”

By clause 7 the company gave the trustees a floating charge over all its assets and undertaking other than its lands in

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Norway, and by clause 8 it gave them a specific charge over those lands.

By clause 10 the security became enforceable (*inter alia*) "if default be made by the company in payment of any principal moneys or interest which ought to be paid in accordance with these presents."

Clause 14. "The receipt of any stockholder for the principal moneys and interest of the stock held by him or the return to the company of the certificate held by him of such stock shall be a good discharge to the trustees."

The first schedule, headed "Conditions as to the Issue of First Charge Debenture Stock," provided as follows:

"The following are the conditions upon which the first charge debenture stock of the Dunderland Iron Ore Company, Limited, secured by trust deed dated November 29, 1904, is to be issued:—

"Condition 1. The stock shall be redeemed on September 1, 1945, and the company shall set aside an accumulative sinking fund of 1 per cent. accruing from September 1, 1910, for securing the redemption of the debenture stock with power to increase such fund." (Here followed various provisions as to redemption.)

"Condition 3. The stock shall carry interest at the rate of 6 per cent. per annum and the company will pay to the stockholders interest on their respective amounts thereof at the rate of 6 per cent. per annum. Such interest will be paid half-yearly on March 1 and September 1 in each year.

"Condition 4. Every holder of stock will be entitled to a certificate under the seal of the company stating the amount of stock held by him and every such certificate shall refer to these presents and be in the form or to the effect following.

"Form of Certificate.

"The Dunderland Iron Ore Company, Limited,

"Incorporated under the Companies Acts, 1862 to 1900.

"Share capital issued - - - - 2,000,000*l.*

divided into 200,000 six per cent. cumulative preference shares of 5*l.* each and 200,000 ordinary shares of 5*l.* each.

"No.

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"Issue of 200,000*l.* (power being reserved for the creation of a

further 300,000*l.* making in all 500,000*l.*) first charge debenture stock made pursuant to clause 19 of the company's articles and to a resolution of the board dated November 29, 1904.

"Bearing interest at the rate of 6 per cent. per annum payable March 1 and September 1.

"The stock is redeemable at the option of the company by means of a cumulative sinking fund of 1 per cent. accruing from September 1, 1910, with annual drawings commencing September 1, 1910, or by purchase in the market at any time after issue at or under the redemption price which is 106 per cent. until September 1, 1925, and after that date at par with power to increase such fund.

"This is to certify that of is the registered holder of pounds of the above stock which stock is constituted and secured by trust deed dated November 29, 1904, and made between the company of the one part and the trustees [naming them] of the other part and is issued subject to the provisions contained in that deed.

"Given under the common seal of the company this day of 190 ."

(Here followed a note that the company would not register a transfer without the production of the certificate.)

"Condition 5. The company will recognize the registered holder of any stock his executors or administrators as the absolute owner thereof . . . and the receipt of such registered holder his executors or administrators for the interest from time to time accruing due in respect thereof and for any moneys payable upon the redemption of the same shall be a good discharge to the company."

"Condition 17. The interest upon the registered stock may be paid by cheque sent through the post to the registered address of the holder . . . Every such cheque shall be made payable to the order of the person to whom it is sent and payment of the cheque shall be a satisfaction of the interest."

The whole of the 500,000*l.* first charge debenture stock was issued. The certificates followed the above form with immaterial variations from time to time as the issue was gradually increased. This form, including the note that the company would not

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register a transfer without the production of the certificate, was all printed on the face of the certificate. In addition thereto the various conditions of schedule 1 (other than the form of certificate) were printed on the back, but were not directly referred to on the face of the certificate.

In November, 1907, 30,000*l.* second charge debenture stock bearing interest at 8 per cent. was issued and secured by a similar trust deed dated November 5, 1907.

In February, 1908, the first and second charge debenture stockholders consented to postpone their security to an issue of 200,000*l.* prior lien six per cent. debentures which were created and secured by a trust deed dated March 27, 1908. The amount actually issued was 110,000*l.*

On September 16, 1908, two persons were appointed receivers and managers in a debenture-holders' action brought by the prior lien debenture-holders and their trustees.

In December, 1908, the petitioners, who held 2500*l.* first charge debenture stock, applied to the company for the 65*l.* interest which fell due on September 1 and which had not been paid. The company failed to pay and intimated its inability to pay the same.

Thereupon, on December 31, 1908, the petitioners presented this petition for a compulsory order to wind up the company.

Two of the petitioners also held 800 preference shares between them, but in substance they claimed as creditors and did not seriously contend that they were entitled to an order as contributories.

The petition was supported by the holders of some 100,000*l.* first and second charge debenture stock. The company was neutral, but the petition was opposed by the holders of 100,000*l.* prior lien debentures and their trustees, first on the ground that the petitioners were not creditors within s. 82 of the Companies Act, 1862, and secondly on the merits. The first point is alone reported.

Gore-Browne, K.C., and *Harold Burrows*, for the petitioners. The petitioners are creditors of the company within the meaning of s. 82 of the Companies Act, 1862. The trust deed provides

(clause 2) that the stockholders are to be regarded as beneficial owners, and (clause 5) that the company will pay the principal and interest when due, not to the trustees, but to the stockholders, whose receipt is a good discharge to the trustees under clause 14, and to the company under condition 5.

[SWINFEN EADY J. The petitioners are not covenantees and could not sue without the trustees.]

Is that really necessary? They are equitable creditors for the 65*l.* interest due and are entitled to give a receipt for it. Is not that sufficient to enable them to present a petition as creditors under s. 82?

Hon. Frank Russell, K.C., and *Cozens-Hardy*, for first and second charge stockholders supporting the petition. The petitioners are equitable creditors under the trust deed, but they are also legal creditors under the certificate. The money was advanced direct to the company and did not go through the hands of the trustees. The certificate issued to the stockholders on this advance states that the stock bears 6 per cent. interest payable March 1 and September 1, and the third indorsed condition states that the company will pay that interest to the stockholders on those dates.

In these circumstances there is an implied contract with the stockholders to pay them the interest, and they could sue at common law. The fact that there is also a covenant with the trustees that the company will pay interest direct to the stockholders is not inconsistent with that implied contract, and, having regard to the receipt clauses of the trust deed, it would be impossible for the company to be sued twice over for the same amount.

Younger, K.C., and *Chetham-Strode*, for the holders of 100,000*l.* prior lien debentures and their trustees. The petitioners are not creditors within the meaning of s. 82.

A. R. Kirby, for the company.

Gore-Browne, K.C., in reply.

SWINFEN EADY J. This is a petition by three debenture stockholders of the Dunderland Iron Ore Company, Limited, holding in the aggregate 2500*l.* first charge debenture stock. The

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interest which accrued on September 1, 1908, is still unpaid, and they ask for a compulsory order to wind up the company. They are also preference shareholders, but in substance this is a petition by them as debenture stockholders. They are supported by the holders of some 100,000*l.* debenture stock.

The first point taken against the petitioners is that they are not creditors and are not entitled to petition as creditors. They are not debenture-holders. They are debenture stockholders, and their stock was created by the trust deed of November 29, 1904. The only parties to that deed are the company and the trustees. [His Lordship referred to the trust deed and the certificate down to the words "given under the common seal of the company," and continued :—] The portion of the stock certificate contained on the face of the certificate is the only part authenticated by the company's seal. It does not in terms certify that the stock was issued subject to the conditions indorsed thereon or anything to that effect. It merely certifies that it was issued subject to the provisions contained in the trust deed, a deed which by clause 6 is binding upon the company and the stockholders and all persons claiming through them respectively. The conditions of issue contained in schedule 1 are then printed at the back of the certificate.

In these circumstances are the petitioners, the debenture stockholders, creditors? There is no covenant by the company with them. The covenant in the trust deed is between the company and the trustees. There is no covenant in the stock certificate, and there is no statement therein beyond a copy of the conditions contained in schedule 1 of the trust deed. In my opinion the true legal position is that the debenture stockholders, although *cestuis que trust*, are not creditors of the company. They have not any direct contract with the company. The contract is between the company and the trustees, and in these circumstances I am of opinion that the petitioners are not creditors entitled to present a winding-up petition. It is not a case in which there is any negotiable security or any coupons issued. The petitioners are merely the registered holders of debenture stock, and the only covenant to pay the principal and

interest to the stockholders is a covenant made between the company and the trustees. SWINFEN
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On that state of facts, the stockholders as such are not creditors of the company. The fact that there is a covenant between the company and the trustees that the company will pay the principal and interest to the stockholders does not entitle them to sue the company as direct creditors and does not make them creditors entitled to present a winding-up petition. It may well be that if the interest on the stock had been duly paid the receipt of the stockholders would have been a good discharge for the money, but that is a very different matter. I therefore determine that the petitioners are not in respect of their holdings of stock creditors of the company.

[His Lordship also dealt with the case on the merits and held that even if the petitioners had been creditors he should not have made an order.]

Solicitors: *Parker, Garrett, Holman & Howden; Julius & Thomas; Norton, Rose, Barrington & Co.*

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In re WESLEYAN METHODIST CHAPEL IN SOUTH
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[Title No. 151,314.]

Land Registry—Restriction on Register—Religious Society—Purchase of Land—Wesleyan Methodist Chapel—Model Deed—Power of Sale—Proceeds applicable as Income—Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 62—Endowment—Consent of Charity Commissioners—Exemption—Registration under Land Transfer Acts, 1875 (38 & 39 Vict. c. 87) and 1897 (60 & 61 Vict. c. 65), Part II.

By a conveyance on sale dated February 13, 1906, a piece of land in the administrative county of London and contiguous to other land already held by them was conveyed to the trustees of a Wesleyan Methodist chapel upon the trusts of the model deed for Wesleyan Methodist chapels. Clause 36 of the model deed provided that upon a sale of land subject to the trusts thereof the trustees should apply the net proceeds "either for or toward promoting the preaching of the Gospel amongst the said people called Methodists, in the circuit in which the said chapel or place of religious worship shall, for the time being, be situated, or" otherwise as therein mentioned :—

Held, that inasmuch as the case came within the exemption provided by s. 62 of the Charitable Trusts Act, 1853, the trustees were entitled to be registered as proprietors of the piece of land so conveyed to them, without the entry on the register of any restrictions on their right to deal with the land.

In re Clergy Orphan Corporation, [1894] 3 Ch. 145, and *In re Church Army*, [1906] W. N. 73; 94 L. T. 559, followed.

MOTION.

By a conveyance dated December 31, 1884, a plot of freehold land in South Street, Wandsworth, was conveyed to trustees upon the trusts declared by a certain indenture of release dated July 3, 1832, therein referred to and generally known as the model deed for Wesleyan Methodist chapels.

Section 36 of the model deed provided that upon a sale of premises subject to its trusts "the trustees and trustee for the time being, acting in the trusts of these presents, shall apply the money which shall arise from every such sale as aforesaid, so far as the same money will extend, to the discharge of all the incumbrances, liabilities, and responsibilities, whether personal

or otherwise, lawfully contracted or occasioned by virtue of these presents, or in the due execution of the trusts thereof, or of any of them; and subject thereto, either for or toward promoting the preaching of the Gospel amongst the said people called Methodists, in the circuit in which the said chapel or place of religious worship, shall, for the time being, be situated, or, for the purpose of procuring a larger, or more conveniently or eligibly situated piece of ground, and chapel, or place of religious worship, and premises, in the place or stead of the said piece of ground, chapel, or place of religious worship, hereditaments, and premises so sold and disposed of, to be settled upon the same trusts, and to and for the same ends, intents and purposes, and with, under, and subject to the same powers, provisoes, and declarations, as are in and by these presents expressed and contained, or such of them as shall be then subsisting, or capable of taking effect."

In February, 1902, the London County Council served upon the trustees of the above-mentioned land in South Street notice to treat for the purchase of part of the chapel premises abutting on South Street aforesaid in order to widen the roadway. After negotiations it was arranged that as compensation for the land to be thus compulsorily acquired the county council should convey to the trustees another piece of land contiguous to that already held by them. This arrangement was carried out by mutual conveyances on sale, the consideration in each deed being expressed to be the sum of 100*l*.

The land so acquired by the trustees was by an indenture of conveyance dated February 13, 1906, conveyed to them upon the trusts of the model deed, and they applied to be registered as proprietors of the land under the Land Transfer Acts, 1875 and 1897, but the registrar was not prepared to proceed without (1.) the consent of the Charity Commissioners to the application (see s. 68 of the Land Transfer Act, 1875, and rr. 83 to 86 of the Land Transfer Rules of 1903), and (2.) either (*a*) a certificate from the Charity Commissioners that the land in question could be sold without their consent, or (*b*) the placing of a restriction on the register in the following terms, namely, "Except under an order of the registrar no transfer is to be registered unless made

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JOYCE J. in accordance with the provisions of the model deed for
1908 Wesleyan Methodist chapels (copy filed), and except during such
WESLEYAN period as the buildings on the land are registered as, or the land
METHODIST is held in connection with buildings registered as, a place of
CHAPEL, meeting for religious worship and bona fide used as such, no
SOUTH disposition is to be registered without the consent of the Charity
STREET, Commissioners.”
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The trustees applied to the Charity Commissioners for their certificate that the land could be sold without their consent, but the certificate thereupon issued by the Commissioners was in two parts, the first of which certified as follows: “The aforesaid trust property is held upon the same trusts as the said chapel, or upon like trusts, and is in respect of situation so connected with or held or used in connection with such chapel that it cannot conveniently be separated therefrom”; while, by the second part, it was certified that “so long as the above-mentioned chapel is registered as a place of meeting for religious worship with the Registrar-General of Births, Deaths, and Marriages in England, and is bona fide used as a place of meeting for religious worship, the hereditaments specified in the schedule hereto, and belonging to the above-mentioned charity, can be sold without the consent of the said Commissioners.”

The trustees, however, stated that they were not prepared to accept the orders; that the buildings referred to were no longer used as a place for religious worship and had in fact been entirely removed; and that they were advised that they were entitled to be registered as proprietors of the land free from any restrictions whatever. The trustees were consequently unable to procure the required consent of the Charity Commissioners to the application, and the registrar declined to proceed without it.

The facts above set out are taken from the model deed and the statement of facts prepared and signed by the registrar for submission to the Court under r. 300 of the Land Transfer Rules, 1903.

It appeared from the evidence that the site of the chapel had been acquired in 1884, and the chapel erected, out of moneys raised partly by voluntary subscriptions and donations, and partly on loan.

The trustees now moved for an order that the Registrar of the Land Registry might be directed to register the applicants as proprietors of the plot of land in question without entering on the register the restriction above set out.

The application was heard by Joyce J. in chambers on October 31.

T. T. Methold, for the applicants.

Sargant, for the Attorney-General.

Cur. adv. vult.

Nov. 28. JOYCE J. The law with reference to the exemption of the property of religious and charitable societies maintained by voluntary contributions from the restrictions in respect of sale imposed by s. 29 of the Charitable Trusts Act, 1855, now rests upon two decisions of the Court of Appeal, namely, *In re Clergy Orphan Corporation* (1) and *In re Church Army*. (2) In the latter case it was held as a logical deduction from the former that land acquired by the Church Army for the purpose of being used as a site for their headquarters was, in the circumstances, within the exemption provided by s. 62 of the Act of 1853, and that consequently the trustees—or the company, as it was in that case—were entitled to have the title to the land registered without any restriction with reference to the consent of the Charity Commissioners.

As is well understood among the members of the Wesleyan Methodist Society and their friends, the sites of chapels and lands purchased to be held in connection with chapels are settled upon the trusts of what is well known as their model deed. This contains powers of sale, with subsidiary provisions, and in particular clause 36 provides that on the sale, after paying liabilities and expenses, and so on, the proceeds may be applied either for or towards the preaching of the Gospel among the said people called Methodists on the circuit in which the said chapel, or place of religious worship, shall for the time being be situated, or for the purpose of procuring another chapel, and so on. The effect of this is that there is no capitalization of the

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(1) [1894] 3 Ch. 145.

(2) [1906] W. N. 73; 94 L. T. 559.

JOYCE J. money derived from voluntary subscriptions and donations applied in establishing a Wesleyan chapel, but such money must be taken to have been, and I doubt not is, in fact given to be held in case the chapel be sold upon the trusts mentioned in the 36th clause which I have read.

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In the particular case before me of the Wesleyan Methodist chapel in South Street, Wandsworth, this and the site were vested in trustees upon the trusts of the model deed. The county council under their powers, in order to widen a street, required and took a piece of land in front of the chapel, and a small strip which formed part of the site of the building itself. Instead of actually paying the value, 100*l.*, it was arranged that the county council, nominally in consideration of a like sum of 100*l.*, should convey to the trustees another small piece of land, the property of the council, adjoining the chapel premises, and convenient to be held therewith. This has been conveyed to the trustees on the trusts of the model deed, and, as everybody, including the Charity Commissioners, admits—indeed the Charity Commissioners have so certified—this land is held on the same trusts as the chapel, or like trusts, and is in respect of situation, so connected with, or held, or used, in connection with such chapel, that it cannot conveniently be separated therefrom. It is thus part of the chapel premises, and beyond all question, so long as the chapel be registered as a place of meeting for religious worship, and bona fide used as such, the restriction upon selling imposed by s. 29 of the Charitable Trusts Act, 1855, does not apply to affect either the site of the chapel or the piece of land recently acquired, as I have mentioned.

This results from s. 62 of the Charitable Trusts Act, 1853, which expressly provides that: "This Act shall not extend to the Universities of Oxford, Cambridge, London, or Durham, or any college or hall in the said Universities of Oxford, Cambridge, and Durham, or to any cathedral or collegiate church, or to any building registered as a place of meeting for religious worship with the Registrar-General of Births, Deaths, or Marriages in England and Wales, and bona fide used as a place of meeting for religious worship."

The chapel trustees contend that independently of this they

would be entitled, and without any consent of the Charity Commissioners, if so minded, to sell and dispose of this piece of land, as well as the site of the chapel, inasmuch as the proceeds of sale may legally be applied and expended as income for the maintenance or purposes of the charity, and that there is not here any endowment within the meaning of that term in the Act that is subject to the jurisdiction of the Charity Commissioners. I am of opinion that this contention of the chapel trustees is well founded, having regard to the decisions of the Court of Appeal which I have mentioned.

The consequence is that, if I am right, the trustees are entitled to be registered as absolute owners of this piece of land without any restrictions.

Solicitors: *Wyatt & Co., for Cooper & Sons, Manchester; Solicitor to the Treasury.*

R. M.

In re ROYAL WORCESTER CORSET COMPANY'S APPLI- CATION TO REGISTER A TRADE MARK. PARKER J.

Trade Mark—Registration—Registrable Mark—Distinctive Mark—"Word or Words"—Use of Word "Royal"—Practice as to Service of Application to the Court that a proposed Mark may be "deemed a distinctive Mark"—Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 9, sub-s. 5; ss. 11, 60, 68—Trade Marks Rules, 1906, rr. 12, 39.

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22.

The Royal Worcester Corset Company, of Worcester, Massachusetts (a company incorporated in the United States of America), applied for registration in class 38 of the words "Royal Worcester" alone as a trade mark for corsets generally. The words had been used for about five years upon, and in connection with advertisements of, corsets manufactured by the applicant company at Worcester, Massachusetts, and sold in the United Kingdom by the Royal Worcester Trading Company (an English firm) as sole agent or licensee of the applicant company, but never without additional words indicating that the corsets were made in America.

The Board of Trade, pursuant to r. 39 of the Trade Marks Rules, 1906, directed the applicant company to apply to the Court for an order under sub-s. 5 of s. 9 of the Trade Marks Act, 1905, that the words should be "deemed a distinctive mark." The Board of Trade also directed that the application should be served on the Comptroller-General (in the Act referred to as "the registrar") on the Royal Worcester Trading Company (which had already applied for registration of the

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same words as a trade mark in connection with corsets and certain articles of clothing) and on the Worcester Royal Porcelain Company, Limited (which was the registered owner of the words "Royal Worcester" as a trade mark for china and pottery, the words being not only distinctive of those things of their manufacture, but connoting the place of their manufacture and the fact that they were supplied to the Royal Family):—

Held—(1.) that before the Court can make an order under sub-s. 5 of s. 9 it must be satisfied that the proposed mark is adapted to distinguish the goods of the applicant from similar goods of other persons; (2.) that, even if so satisfied, an order ought not to be made if the mark ought not to be registered for some other reason, e.g., because the registration would contravene s. 11; (3.) that the proposed words were not so adapted to distinguish the corsets from those of other persons, and therefore were not in themselves "distinctive words" within the meaning of s. 9; (4.) that the words had not become by user "distinctive," apart from the use of other words not sought to be registered, and were not, therefore, "distinctive" within the meaning of s. 9; (5.) that registration ought also to be refused because of the suggestion in the use of the word "Royal" that the applicant company enjoyed royal patronage (which it was not suggested that it enjoyed) and would be calculated to deceive within the meaning of s. 11; (6.) that the practice of the Board of Trade of indicating upon whom an application to the Court should be served was a convenient practice, and that the two companies served in this case were properly served and entitled to be heard; and (7.) that if an applicant does not serve any person so indicated the Court can either proceed without any service or direct service to be made according to its own view of what the circumstances require.

Semble, that the word "Royal" may be used in such a way as to negative any suggestion of the enjoyment of royal patronage.

On June 17, 1908, the Royal Worcester Corset Company, of Worcester, Massachusetts, a company incorporated in the United States of America, applied to the Registrar of Trade Marks for registration in class 38 of the words "Royal Worcester" as a trade mark in connection with corsets.

The registrar directed an application to be made to the Court, and by direction of the Board of Trade the application to the Court was served on the Worcester Royal Porcelain Company, Limited, and on the Royal Worcester Trading Company.

The Worcester Royal Porcelain Company, Limited, was the registered owner of the words "Royal Worcester" as a trade mark in respect of china and pottery. The Royal Worcester Trading Company was a private firm which was the sole agent

or licensee in this country of corsets made by the applicants, and on May 16, 1908, applied to have the words "Royal Worcester" registered as its trade mark for corsets, stays, costumes, skirts, and petticoats, and on June 6, 1908, to have the words "Royal Worcester Trading Company" registered as its trade mark for the same goods, alleging in each case that the words had by user become exclusively distinctive of goods supplied by them. The words "Royal Worcester" had been used for some five years upon and in connection with advertisements of corsets manufactured by the American company at Worcester, Massachusetts, and sold in this country by the Royal Worcester Trading Company as sole agent or licensee of the American company, but there was no evidence that the words had ever been used upon or in advertisements of the American company's corsets without additional words indicating that the goods were made in America.

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The application was heard by Parker J. on January 13 and 14, 1909.

Walter, K.C., and *Colefax*, for the applicants, the Royal Worcester Corset Company. The application is for registration in class 38 in the Third Schedule to the Trade Marks Rules, 1906, in respect of corsets. The mark has nothing to do with china or pottery. Sect. 9 of the Trade Marks Act, 1905, provides that a registrable trade mark must contain or consist of at least one of certain particulars, one of which is "(5.) Any other distinctive mark," but the section provides that "a name, signature or word or words, other than such as fall within the descriptions . . . (1.) (2.) (3.) and (4.) shall not, except by order of the Board of Trade or the Court, be deemed a distinctive mark. . . . For the purposes of this section 'distinctive' shall mean adapted to distinguish the goods of the proprietor of the trade mark from those of other persons. In determining whether a trade mark is so adapted, the tribunal may, in the case of a trade mark in actual use, take into consideration the extent to which such user has rendered such trade mark in fact distinctive for the goods with respect to which it is . . . proposed to be registered."

PARKER J. The mark has for some years been used by the applicants in
1909 this country in connection with corsets. The Royal Worcester
ROYAL Trading Company has been served with notice of the application,
WORCESTER but actually supports it. The only objectors, therefore, are the
CORSET Board of Trade and the porcelain company, which was also
COMPANY'S directed to be served.
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One objection taken is that the word "Royal" forms part of the mark. It is true that, except as regards "old marks," the word "Royal" is forbidden by r. 12 of the Trade Marks Rules, 1906, to appear on trade marks the registration of which is applied for, but if the case is within that rule, the rule seems to be ultra vires. Sect. 60 of the Act of 1905, which gives the Board of Trade power to make rules, does not enable it to make rules as to matters to which the Act does not relate. It depends on the sense in which the word "Royal" is used whether it can be construed as referring to His Majesty or the Royal Family: *In re Royal Baking Powder Co.* (1) All that is forbidden by s. 68 is the user without authority of the Royal Arms, or any "device emblem or title in such manner as to be calculated to lead to the belief" that the person using it supplies goods to His Majesty or a member of the Royal Family, and using the word "Royal" is not within that section, which is for the protection of royal warrant holders. The registration of the mark will not prejudicially affect the porcelain company.

The words proposed to be registered are "distinctive." The word "Oswego" was held to be "adapted to distinguish" an applicant's cornflour from the cornflour of other persons, and, therefore, to be registrable as a "distinctive mark": *In re National Starch Co.* (2) The rules as to special applications under sub-s. 5 of s. 9 are rr. 35—41 of the Trade Marks Rules, 1906, and the form of application to the Board of Trade under r. 38 is the Form T. M. No. 10 in the Second Schedule to the rules. The Board may refer the appeal to the Court under r. 38, but it has no power to direct service of the application on any one but the Comptroller, and the two companies served are not entitled to be heard in opposition to the application.

Sebastian, for the Worcester Royal Porcelain Company, Limited.

(1) (1902) 19 Rep. Pat. Cas. 261.

(2) [1908] 2 Ch. 698.

As regards the last objection, it was decided long ago that the owner of a registered mark might appear: *In re Trade Mark "White Rose."* (1) The Worcester Royal Porcelain Company was ordered to be served here, and is also a royal warrant holder. The words could not be registered without some addition to them denoting the American origin of the goods, and it is doubtful whether the words are registrable at all.

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Draper, for the Royal Worcester Trading Company. In *In re National Starch Co.* (2) it was held that the Court had not to consider on such an application as this whether the words sought to be registered might lead to confusion between goods of the applicant and similar goods of other persons. There is nothing in the Act itself to prevent the word "Royal" being used. Sect. 68 of the Act of 1905 must be compared with s. 106 of the Patents, Designs and Trade Marks Act, 1883, and was passed to protect royal warrant holders and to some extent the public; but it contains no words forbidding the use of the word "Royal." Rule 12, if valid, must be construed as meaning that the use of the word "Royal" is forbidden in cases where it implies that the person using it has royal patronage, but there is no such suggestion here.

Sargant, for the Registrar of Trade Marks. The mark ought not to be registered. The rule is made under ss. 60, 68, and 11. The use of the word "Royal" is the use of a "title" "in connection with a trade or business" within the meaning of s. 68. The Court has to consider whether the mark is a registrable mark per se, and the proposed mark is not a registrable mark. It would be a curious result if an English company could not say that it had the right to register the words "Royal Worcester" in this country while a republican company could do so. Both the words "Royal" and "Worcester" are such as are not enough to distinguish the goods of the applicant from the goods of other persons. The word "Royal" is also objectionable as contravening ss. 11 and 68, as well as r. 12. Moreover, the words sought to be registered are "Royal Worcester" alone, and not "Royal Worcester" with the addition of a reference to the United States of America.

(1) (1885) 30 Ch. D. 505.

(2) [1908] 2 Ch. 698.

PARKER J. *Colefax*, in reply. Conditions can be attached to the registration so as to remove any objection to the use of the mark.
 1909
 ROYAL [PARKER J. referred to *British Vacuum Cleaner Co. v. New*
 WORCESTER *Vacuum Cleaner Co.* (1)]
 CORSET
 COMPANY'S The rules under the old Act did not refer to the use of
 APPLICATION, "Royal."
In re. [Sargant referred to *Institute of Patent Agents v. Lockwood.* (2)]

Cur. adv. vult.

Jan. 22. PARKER J. On June 17, 1908, the applicants, the Royal Worcester Corset Company, of Worcester, Massachusetts (a company incorporated in the United States), applied to the registrar for registration in class 38 of the words "Royal Worcester" as a trade mark for corsets. These words are not registrable under sub-ss. 1, 2, 3, or 4 of s. 9 of the Trade Marks Act, 1905. If registrable at all, they can only be registered under sub-s. 5 of that section, and only then if they are distinctive, that is, adapted to distinguish the corsets of the applicants from those of other persons. By the express words of the section they cannot, however, be deemed distinctive unless the Board of Trade or the Court make an order to that effect. The Board of Trade, pursuant to r. 39 of the Trade Marks Rules, 1906, have directed the applicants to apply to the Court for such an order, and the applicants have accordingly made the application now before me.

Pursuant to the directions of the Board of Trade, this application has been served not only on the comptroller, but on the Worcester Royal Porcelain Company, Limited, and on a private firm carrying on business as the Royal Worcester Trading Company. The Worcester Royal Porcelain Company, Limited, are the registered owners of the words "Royal Worcester" as a trade mark for china and pottery, these words being not only distinctive of china and pottery of their manufacture, but connoting the place of manufacture of such goods and the fact that they are supplied to the English Royal Family. The Royal Worcester Trading Company is sole agent or licensee for the sale in this

(1) [1907] 2 Ch. 312.

(2) [1894] A. C. 347.

country of corsets made by the applicants, and had applied on May 16, 1908, to have the words "Royal Worcester" registered as their trade mark for corsets, stays, costumes, skirts, and petticoats, and on June 6, 1908, to have the words "Royal Worcester Trading Company" registered as their trade mark for the same goods, in each case alleging that the words sought to be registered had by user become exclusively distinctive of goods supplied by them, although now they support the applicants and state that the words "Royal Worcester" are distinctive of the applicants' goods.

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Counsel for the applicants objected that the Board of Trade had no power to direct service on any one except the comptroller, and that, therefore, neither the Worcester Royal Porcelain Company, Limited, nor the Royal Worcester Trading Company was entitled to be heard. Whatever be, strictly speaking, the powers in this respect of the Board of Trade, it is, in my opinion, a convenient practice that upon directing an application of this nature to the Court they should indicate upon whom, in their opinion, the application should be served. If the applicant does not serve any person so indicated, the Court can either proceed without such service, or direct such service to be made, according to its own view of what the circumstances require. In the present case I think that both the respondents in question were properly served and entitled to be heard.

Before the Court can make an order under sub-s. 5 of s. 9 it must be satisfied that the proposed mark is adapted to distinguish the corsets of the applicants from those of other persons; but even if so satisfied it would not, I think, be justified in making an order, if, for some other reason, it came to the conclusion that the mark ought not to be registered. For example, it would, in my opinion, be wrong to order that the proposed mark should be deemed distinctive under s. 9 if it could not be registered because of the provisions of s. 11. In this respect I dissent from the arguments put forward by counsel for the applicants.

I will consider, first, whether the words "Royal Worcester" are adapted to distinguish the corsets of the applicants from those of others. If applied to goods in this country without explanation, they would, as in the case of Royal Worcester

PARKER J. china and pottery, naturally suggest that such goods were made at Worcester in England and supplied to the English Royal Family. They do not, therefore, appear to me to be in themselves distinctive words within the meaning of the section. This does not, however, conclude the question, because the words may have become distinctive by user, and, if so, I am entitled to take this into account in determining whether they are, in fact, distinctive within the meaning of the section. It appears that the words have been used for some five years upon, and in connection with advertisements of, corsets manufactured by the applicants at Worcester, Massachusetts, and sold in this country by the Royal Worcester Trading Company as their sole agent or licensee. I cannot, however, find any evidence that the words "Royal Worcester" have ever been used upon, or in advertisements of, the applicants' corsets without additional words indicating that the goods were made in America. Indeed, it was stated by counsel that by reason of the prevailing fashion it is the American manufacture which has attracted customers. Although, therefore, the words "Royal Worcester" in connection with other words referring to the American origin of the goods may have become distinctive of the applicants' corsets made at Worcester, Massachusetts, I have no evidence that they would be distinctive if used without words referring to the American origin of the goods. The words, if used alone, without some reference to the American origin of the goods, might even lead a customer to suspect that the goods were not the goods of the applicants, but goods made at Worcester in England. The applicants seek to have the words registered in respect of corsets generally, and not in respect only of corsets made by them in America, and, if they obtained registration, could use the words in connection with corsets of their manufacture, or merchandise, wherever made; and, of course, the applicants, if they desired to do so, could manufacture their corsets in this country. Under the circumstances, therefore, I am not satisfied that the words are distinctive within the meaning of the section, and should refuse the application on this ground alone.

I am of opinion, however, that the application ought also to be refused because of the suggestion contained in the use of the

word "Royal." This word, as I have said before, *prima facie* suggests royal patronage, and it is not alleged that the applicants enjoy such patronage. I can conceive cases in which the word "Royal" is or has been used in such a way as to negative any such suggestion, but in the present case, even though the purchasers of the applicants' corsets have been fully aware that the applicants are an American company and that their corsets are made in America, it is consistent with the evidence before me that those purchasers may have been led to suppose that the applicants enjoyed royal patronage. Certainly the words, if used in connection with corsets generally and without reference to the place of manufacture, would suggest such patronage and therefore be calculated to deceive within the meaning of s. 11 of the Act. On this ground also I think the application should be refused.

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The applicants will have to pay the costs of the respondents generally, both the comptroller's and the others.

Solicitors for the applicant company and the Royal Worcester Trading Company: *Burchells*.

Solicitors for the Worcester Royal Porcelain Company Limited: *Church, Rendell & Co.*

Solicitor for the Registrar: *Solicitor to the Board of Trade.*

F. E.

PARKER J.

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Jan. 30.

In re TORRY HILL ESTATE.PEMBERTON *v.* PEMBERTON.

[1868 P. 58.]

Practice—Settled Land—Payment out to Trustees—Money liable to be invested in Land—Capital Money—Summons—Petition—Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 21, sub-s. ix.; s. 33—Settled Land Act Rules, 1882, r. 2—Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 14.

An application for payment out of Court to Settled Land Act trustees of a fund exceeding 1000*l.*, which has not arisen under the Settled Land Act, 1882, but has been derived from another source and is liable to be laid out in the purchase of land to be made subject to the settlement, may be made by petition instead of by summons in chambers under r. 2 of the Settled Land Act Rules, 1882.

PETITION.

By his will dated August 31, 1867, Lord Kingsdown, who died in October, 1867, directed that his Torry Hill estate should be settled under the direction of the Court of Chancery, and also that his residuary personal estate should be laid out in the purchase of lands to be settled upon the same trusts as the Torry Hill estate. A settlement of the Torry Hill estate, under which the trustees had a power of sale, was duly executed on June 1, 1869, by direction of the Court, given in an action of *Pemberton v. Pemberton*, brought for the administration of Lord Kingsdown's estate and for the execution of the trusts of his will. The residuary personal estate was realized and the proceeds paid into Court to the credit of the action. Orders had been made from time to time for payment of income to the tenant for life and for investment of part of the funds in the purchase of land, and the funds in Court now consisted of the sum of 12,757*l.* 19*s.* 8*d.* Consols.

The tenant for life was desirous that the funds in Court should be invested or applied as capital money of the settlement arising under the Settled Land Acts, and that, in order to avoid the expense and delay of application to the Court whenever it was desired to make or vary an investment or to carry out an improvement of the settled estates, the funds should be paid out to the trustees of the settlement for the purposes of the Acts.

An application for an order for payment out to the trustees PARKER J.
 was made by originating summons in chambers under r. 2 1909
 of the Settled Land Act Rules, 1882, and the note on that rule TORRY HILL
 given in Wolstenholme on the Conveyancing and Settled Land ESTATE,
 Acts, 9th ed. p. 455, was referred to, but Parker J. was of opinion *In re*,
 that, inasmuch as the money had come into Court in the action PEMBERTON
 and not under the Settled Land Acts, and in consideration of *v.*
 the magnitude of the fund, the application ought, for the con- PEMBERTON
 venience of the Paymaster-General, to be made by petition. —

The tenant for life under the will and settlement of 1869 therefore filed this petition, intituled In the matter of the Torry Hill estate and the Settled Land Acts and the action of *Pemberton v. Pemberton*, asking that the funds might be paid out to the trustees of the settlement as trustees for the purposes of the Settled Land Acts, 1882 to 1890, for investment or application by them as capital money of the settlement arising under the Acts, or that 10,300*l.* might be raised out of the funds and invested as capital money of the settlement arising under the Acts on security of certain freehold estates in Lincolnshire.

Romer, K.C., and *F. H. Schwann*, for the petitioner. By s. 33 of the Settled Land Act, 1882, the Court has power to deal with these funds as capital money arising under the Act, although they in fact arose under the will of Lord Kingsdown: Wolstenholme on the Conveyancing and Settled Land Acts, 9th ed. p. 390, and the cases there cited. The section applies although the money is in fact in Court: *Clarke v. Thornton*. (1) Under s. 21, sub-s. ix., the Court can direct payment to the trustees of this settlement as persons absolutely entitled or empowered to give an absolute discharge—s. 14 of the Settled Land Act, 1890—and the wish of the tenant for life will be respected: s. 22, sub-s. 3, of the Act of 1882. This has been done in cases under s. 32 of the Act of 1882, which contains similar provisions with regard to money arising from land taken compulsorily, though the Court has a discretion: *In re Smith*. (2)

Broughton, for the respondents, supported the petition.

(1) (1887) 35 Ch. D. 307, 314.

(2) (1888) 40 Ch. D. 386.

PARKER J. PARKER J. In my opinion it is right that this application
1909 should be made by petition and not by summons in chambers
TORRY HILL under r. 2 of the Settled Land Act Rules, 1882. That rule
ESTATE, applies where the money in Court is capital money arising under
In re. the Act, but it does not necessarily apply where the money has
PEMBERTON been paid into Court in a different action and exceeds 1000l.
v. I think I have jurisdiction to make an order for payment out to
PEMBERTON. the trustees of the settlement, and it will be a convenient course
— to pursue. The money in Court represents the residuary
personal estate of the late Lord Kingsdown and is subject to a
trust for investment in land to be settled upon the same trusts
as the Torry Hill estate, which was settled by the Court pursuant
to a direction contained in his will. It is a case, therefore, to
which s. 33 of the Settled Land Act, 1882, is applicable, and
under that section the money may, at the option of the tenant
for life, be invested or applied in any manner in which capital
money arising under the Act from the sale of any part of the
Torry Hill estate would be applicable. Under s. 21, sub-s. ix.,
capital money arising under the settlement created by the will
of Lord Kingsdown and the settlement made pursuant to the
direction of the Court can be paid out to the trustees of the
settlement as persons absolutely entitled. That would be a
proper application of capital money arising under the settlement.
Therefore, in my opinion, I am authorized by s. 33 to deal with
this fund in that way as if it had arisen under the Act. The
same principle has been applied to money arising from a com-
pulsory purchase of land under the Lands Clauses Consolidation
Acts, which is dealt with by s. 32, and it has been held that
money paid into Court under such circumstances can be paid
out to the trustees of the settlement for the purposes of the
Settled Land Acts, and that that is a proper application of the
money as capital money. I therefore make the order for
payment out of these funds to the trustees. The costs, including
the costs of the summons, will come out of the funds.

Solicitors: *Meynell & Pemberton.*

H. C. R.

In re ATKIN'S TRUSTS.SMITH *v.* ATKIN.

[1907 A. 1610.]

EVE J.

1908

Nov. 12.

Practice—Pauper—“Not worth 25l.”—Married Woman Plaintiff—52l. yearly Income—Restraint on Anticipation—Affidavit of Want of Means—Joinder of Husband—Rules of the Supreme Court, 1883, Order XVI., rr. 22, 24.

A married woman in receipt of a yearly income of 52l. without power of anticipation obtained an *ex parte* order for leave to prosecute in forma pauperis an action in which she was sole plaintiff. Upon the application of the defendants to dispauper her:—

Held, that the married woman was not a person “not worth 25l.” within the meaning of Order XVI., r. 22, and must be dispaupered.

The principle of *Boddington v. Woodley*, (1842) 5 Beav. 555, and *Kydd v. Liverpool Watch Committee*, (1908) 24 Times L. R. 257, applied.

Quere whether the joinder of her husband in the affidavit of want of means by a married woman seeking to be admitted to sue in forma pauperis is in all cases absolutely necessary.

MOTION.

The plaintiff, a married woman, had commenced the above-mentioned action as tenant for life under certain indentures of settlement against the present trustees and the executors of a deceased trustee for execution of the trusts and restoration of trust funds alleged to have been lost.

Upon the application of the defendants she had been ordered to give security for costs to the amount of 50l., which sum she had paid into Court; and after delivery of the defences she was ordered, on March 18, 1908, to give further security for 150l., and until the security was given she was not to take any further proceedings in the action. This order she had not obeyed.

On April 29, 1908, the plaintiff upon petition *ex parte* obtained leave to prosecute her claim in the action in forma pauperis. The petition stated that she had assigned all her interest in the 50l. paid into Court as security for costs, and that her only income, apart from some small sums earned by teaching English to one or two Italian girls at Rome, was

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52*l.* 5*s.* 5*d.* per annum received from the trustees of the settlement above mentioned. Her affidavit in support of the petition was sworn before the British Consul at Rome and described her as resident in Italy and stated as follows: "I am not worth the sum of twenty-five pounds, my wearing apparel and the subject-matter of this action only excepted."

Under the above-mentioned settlement, which was made upon her first marriage, the plaintiff was entitled for her separate use, without power of anticipation, during the joint lives of herself and her first husband, who was still alive, to a yearly income of 52*l.* 5*s.* 5*d.* arising from the trust funds comprised in the settlement and consisting of colonial inscribed stock, Consols, annuities, and half the rent of a leasehold house. The first marriage was dissolved in 1881 upon the husband's petition, and on December 23, 1899, the plaintiff was married to her present husband. The evidence shewed that the latter had been imprisoned in the United States of America in June, 1905, and discharged in April, 1907; that on leaving prison he was totally blind and penniless, and was at his own request put into a train for St. Louis; and that plaintiff had not since heard of his movements. She had not lived with him for seven years, and he had not contributed anything to her support for that period.

The defendants in the action now moved to discharge the order giving the plaintiff liberty to sue in forma pauperis upon the following amongst other grounds: That the plaintiff was possessed of more than 25*l.* exclusive of the subject-matter of the action, and that, the plaintiff being a married woman, her husband did not join in the affidavit of want of means sworn by the plaintiff.

Gatey, for some of the defendants. On her own admission the plaintiff has an income of 52*l.* 5*s.* 5*d.* per annum, and I submit that it is not possible to say that she "is not worth 25*l.*" On this ground alone the order ought to be discharged. Further, the plaintiff's husband should have joined in her affidavit of no means: *In re Roberts*. (1) That was the case of a woman married before the Married Women's Property Act, 1882, but I submit

(1) (1886) 33 Ch. D. 265.

that there is no difference in principle whether the married woman is married before or after that Act.

Colquhoun Dill, for the other defendants.

Luxmoore, for the plaintiff, the married woman. I submit that the true principle is that if the alleged pauper has not 25*l.* "available for the suit," then he or she can be admitted to sue in forma pauperis; that is the effect of Lord Cottenham's observations in *Dresser v. Morton*, (1) In *Perry v. Walker* (2) the plaintiff was dispaupered on the ground that he was entitled to leasehold premises producing an annual rent of 79*l.* subject to a ground rent of 50*l.* a year, and in *Boddington v. Woodley* (3) the Court held that an officer in receipt of half-pay amounting to 150*l.* per annum, which was not alienable, should not be allowed to proceed in forma pauperis. Those were cases under the early rule, when the limit was 5*l.*

The most recent and nearest case in point is *Kydd v. Liverpool Watch Committee* (4), where the true test is given by Buckley L.J., namely, what would a banker say to the question whether the person seeking to sue in forma pauperis was good for 25*l.*? Applying that test in the present case, I submit that the answer must be that the plaintiff is not good for 25*l.* She only has 52*l.* 5*s.* 5*d.* per annum, payable quarterly, and after providing for her maintenance it would not be possible for her to save 25*l.* before the action would come on for trial. With regard to the other objection, the plaintiff was married after the Married Women's Property Act, 1882, and this case is therefore distinguishable from *In re Roberts*. (5) In the circumstances it would be a great hardship for her to be dispaupered on so technical an objection.

EVE J. stated the facts, and continued:—It is quite clear on the authorities and on the rules themselves that the burden lies upon any person seeking to sue or to continue to prosecute an action in forma pauperis of satisfying the Court that he or she is not worth 25*l.* excluding the subject-matter of the action and his or her wearing apparel.

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(1) (1847) 2 Ph. 286.

(2) (1842) 1 Y. & C. Ch. 676;

(1844) 1 Coll. 229.

(3) 5 Beav. 555.

(4) 24 Times L. R. 257.

(5) 33 Ch. D. 265.

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What I have to ask myself in this case is, Has the plaintiff established that fact to the satisfaction of the Court? Mr. Gatey says that in two respects she has fallen short of what is required of her. In the first place she is suing as a married woman and as the wife of the husband who is named on the writ, and he has not joined in the affidavit. I am not quite sure whether that is not a fatal objection, but in this case it would be extremely hard if that were the objection on which I had to decide against this lady, because it appears from the evidence that the husband is an individual who has suffered imprisonment in America; he was discharged in April of last year from the penitentiary or prison in which he had been confined, totally blind, and at his own request he was transported—to use the word which is used in the prison official's letter—to St. Louis at the expense of the prison authorities. From that day to this, as I read the lady's affidavit, she has never heard any more of him, and if in other respects she had established the fact that she was a pauper and entitled to sue in *forma pauperis*, it certainly would be extremely hard that she should be dispaupered merely because she had not obtained the joinder of such a husband in the affidavit necessary to establish the fact. But fortunately I am not called upon to determine whether in all cases the joinder of the husband is absolutely necessary, because in this case there is another ground upon which I feel constrained, having regard to the authorities, and particularly to the most recent of them, to hold that this lady has not established the fact that she is not worth 25*l.*

Under the very settlement which is the foundation of this action, she is entitled as tenant for life to an income amounting to some 52*l.* a year. It is true that she is restrained from anticipation, and it is true, therefore, that *rebus sic stantibus*—she being still under coverture and there being no order releasing the restraint—she is not in a position to charge effectually the accruing income by way of security to a solicitor or anybody else who might be prepared to finance her. But that fact alone, both in the case of the half-pay officer in *Boddington v. Woodley* (1) and in the case of the police inspector enjoying an inalienable pension under the Police Act in *Kydd v. Liverpool Watch*

(1) 5 Beav. 555.

Committee (1), has been held insufficient to induce the Court to say that the pension or the annuity is not to be taken into account in estimating the property of the person who is seeking to sue in *forma pauperis*.

Now this lady is in possession of that annuity, and it is an annuity to which a restraint attaches by reason of the contract contained in the marriage settlement; but it must not be lost sight of that under comparatively recent legislation it is competent for a judge of this Division, if he thinks it is for the benefit of the married woman, so far to release or remove that restraint as to enable her to charge her interest notwithstanding that she is so restrained, and, therefore, although in terms it is a contractual and operative restraint, the fact must not be left out of sight that it is a restraint which is capable of being removed if and so far as removal be for the benefit of the married woman; it is therefore a restraint qualified to that extent. It seems to me that the moment this is appreciated the Court is bound to hold that the case comes within the principle applied by the Court of Appeal in the case of *Kydd v. Liverpool Watch Committee*. (1) This lady, being entitled to this annuity, although subject to the qualified restraint which I have mentioned, cannot establish that she is not worth 25*l*.

In these circumstances and on that ground, and not upon the ground that the husband has not joined in the affidavit, a matter on which I express no opinion under the peculiar circumstances of this case, I hold that the plaintiff is not entitled to proceed under the *ex parte* order, but that it is my duty to dispauper her, and I must make an order to that effect, and inasmuch as the defendants have been compelled to take these proceedings for the purpose of getting the order set aside, the costs of this application must be theirs in any event.

Solicitors: *Simpson, Palmer & Winder; Nelson, Son & Plews; Webbers & Duncan.*

(1) 24 Times L. R. 257.

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LADY HOOD OF AVALON *v.* MACKINNON.

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[1908 H. 2280.]

Feb. 5.

*Mistake—Forgetfulness—Appointment—Deed Poll—Rescission—Intention—
Equitable Relief.*

An appointment by deed poll, made in entire forgetfulness by the appointor of an earlier appointment to the same person, may be rescinded and set aside on the ground of mistake.

WITNESS ACTION.

By an indenture of settlement dated September 29, 1855, made upon the marriage of the plaintiff, Fanny Henrietta, Baroness Hood of Avalon, with the late Lord Hood of Avalon (referred to as the Hood settlement), certain personal estate was settled upon trust during the joint lives of Lord Hood of Avalon and the plaintiff to pay the income to Lord Hood, and after the death of either of them to pay the income to the survivor of them for life, and after the death of such survivor in trust, as to the capital and income, for all or such one or more exclusively of the other or others of the issue of the marriage (whether children or remoter descendants), if more than one, in such shares and in such manner as Lord Hood of Avalon and the plaintiff should by deed, with or without power of revocation and new appointment, jointly appoint, and, subject to such joint appointment, then as the survivor of them should in like manner or by will or codicil appoint, and, subject to any such appointment, in trust for the children in the usual form, with a hotch-pot clause.

There were issue of the marriage two daughters and no other child, the elder being the defendant Emily Isabel Mackinnon, and the younger Fanny Sophia Allen. On the occasion of the marriage of Emily Isabel to Francis Alexander Mackinnon, and with the view of making a provision for that daughter and her issue, Lord and Lady Hood of Avalon executed a deed poll, dated April 18, 1888 (in exercise of their joint power of appointment under the Hood settlement), whereby they irrevocably appointed that, if the intended marriage of F. A. Mackinnon and

E. I. Mackinnon should be solemnized (as in fact it was) before the expiration of twelve months from the date of the deed poll, the trustees of the Hood settlement should, subject and without prejudice to the respective life interests therein of Lord Hood of Avalon and the plaintiff, stand possessed of one equal half share of the stocks, funds, shares, securities, or property then or thereafter subject to the trusts of the Hood settlement in trust for the defendant E. I. Mackinnon absolutely.

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By an indenture of settlement of even date, executed after the said deed poll, being a settlement made on the marriage of F. A. Mackinnon and E. I. Mackinnon (referred to as the Mackinnon settlement), this one equal half share of the funds subject to the trusts of the Hood settlement was assigned by E. I. Mackinnon, with the concurrence of her husband, to trustees upon trust for herself, her husband and children, in the usual form; and there was a covenant for the settlement of the wife's after-acquired property of the value of 500*l*.

Lord Hood of Avalon died on November 16, 1901. Fanny Sophia, the younger daughter, married Henry Allen, but no appointment or settlement was made on such marriage.

Mrs. Allen desired to raise money, and, in order to enable her to do so, the plaintiff on October 24, 1902, in exercise of the power given to her by the Hood settlement, irrevocably appointed that after her decease the sum of 1600*l*. should be raised out of the funds subject to the trusts of the Hood settlement and be held in trust for Mrs. Allen for her absolute benefit. On January 16, 1904, the plaintiff, being desirous of further assisting her younger daughter, executed another deed poll irrevocably appointing a further sum of 7000*l*. in similar terms to Mrs. Allen absolutely. Having thus appointed 8600*l*. in favour of her younger daughter, and being desirous of equalizing, as she thought, the shares of her two daughters in the trust funds subject to the Hood settlement, and entirely forgetting the joint appointment of April 18, 1888, in favour of her elder daughter, the plaintiff, on August 4, 1904, in exercise of the power under the Hood settlement, irrevocably appointed a sum of 8600*l*. to the defendant E. I. Mackinnon absolutely. The plaintiff by her statement of claim alleged that this last deed

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was executed under a serious mistake as to the facts, and that her sole object was to produce complete equality between her two daughters, and that had she been aware of the former appointment to her elder daughter she would not have executed the deed of August 4, 1904. The total value of the trust funds subject to the Hood settlement was 29,000*l*. It was not until March, 1908, that the present solicitors for the plaintiff became aware of the appointment of April 18, 1888, as Messrs. Wynne & Son were the solicitors acting for Lord and Lady Hood of Avalon at that time. This firm came to an end in 1895, when Messrs. Iliffe, Henley & Sweet became the solicitors for Lord and Lady Hood. Immediately on becoming aware of the appointment of April 18, 1888, Messrs. Iliffe, Henley & Sweet communicated with Lady Hood of Avalon, with the result that the action was brought, and the plaintiff sought a declaration that the deed poll of August 4, 1904, should be rescinded and set aside. The plaintiff deposed that she had no recollection whatever of the joint deed of appointment of April 18, 1888, to her elder daughter, although she admitted her signature to the deed. She stated that her sole object in making the final appointment of August 4, 1904, was to equalize the shares of her two daughters in the trust funds subject to the Hood settlement.

P. O. Lawrence, K.C., and *George Borthwick*, for the plaintiff. The question is whether mere forgetfulness is a "mistake" entitling the plaintiff to rescission of this deed poll. Such a deed can be rectified on the ground of mistake if the mistake is clearly proved: *Kerr on Fraud and Mistake*, 3rd ed. p. 463; *Wright v. Goff* (1); *Killick v. Gray* (2); *Bonhote v. Henderson*. (3) In the case of *Barrow v. Isaacs & Son* (4) Lord Esher M.R. considered that in ordinary language mere forgetfulness was not "mistake." But those remarks were not concurred in by Lopes and Kay L.JJ., the other members of the Court. In fact Kay L.J., in giving the decision in which Lopes L.J. concurred, referred to two cases, *Kelly v. Solari* (5) and *Brownlie v.*

(1) (1856) 22 Beav. 207.

(3) [1895] 1 Ch. 742; [1895] 2 Ch. 202.

(2) (1882) 46 L. T. 583.

(4) [1891] 1 Q. B. 417.

(5) (1841) 9 M. & W. 54.

Campbell (1), which established that money paid under forgetfulness of facts could be treated as paid under mistake, even where the party paying had the means of knowing the truth. Here the intention of the plaintiff was evident and the mistake clear.

A. P. Van Neck, for Mrs. Mackinnon.

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F. Whinney, for the trustees of the Mackinnon settlement. Having regard to the fact that there are infant reversioners entitled under the Mackinnon settlement, it is submitted that the deed poll in question cannot be rescinded even if the plaintiff executed it under a mistake of facts arising from forgetfulness. In the case of *Kelly v. Solari* (2), referred to in *Barrow v. Isaacs & Son* (3), the payee was in possession of money to which he was not entitled, and the Court would not allow him to retain it. In the present case the deed sought to be rescinded was in fact executed in exact accordance with the instructions of the plaintiff to her solicitors. It would be dangerous for the Court to accede to this claim at the instance of the appointor. If the deed is rescinded, there would still be inequality between the daughters, as the elder has now only a life estate in the funds under her settlement, and the appointment to the younger gives her an absolute interest. There is no reported case in equity where a mistake has been corrected in this way by total rescission. There might be a case for rectification, but it is not suggested that the deed should be rectified either by inserting a power of revocation or a hotchpot clause: *In re Tancred's Settlement* (4); *Walker v. Armstrong*. (5)

P. O. Lawrence, K.C., in reply. Once the Court has jurisdiction it will apply the correct remedy, and will either sweep away the deed altogether or rectify it. Rescission or rectification is only a question of degree. Here the only appropriate remedy is rescission.

EVE J. (after stating the facts as to the earlier appointments). I am quite satisfied from the evidence which I have heard that the predominating idea in Lady Hood's mind in 1904 was,

(1) (1880) 5 App. Cas. 925, 952

(3) [1891] 1 Q. B. 417.

(2) 9 M. & W. 54.

(4) [1903] 1 Ch. 715.

(5) (1856) 8 D. M. & G. 531.

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that having made these large appointments in favour of the younger daughter, she felt constrained to do something which should place her elder daughter in at least as advantageous a position as regards the settled fund as her younger daughter had been placed in by reason of these two appointments. She accordingly, with a view to giving effect to that intention, and, as she thought, of benefiting the elder daughter to the same extent as she had already benefited her younger daughter, instructed her solicitor to prepare a deed of appointment, putting the elder daughter on an equality with the younger daughter.

Now, I am satisfied that at that moment of time Lady Hood had not the slightest recollection, and her solicitor had not the slightest knowledge, of the appointment to the elder daughter which had been made some six years previously on the occasion of her marriage; and, accordingly, when her solicitor came to give effect to the instructions which he had received from Lady Hood, he did so by appointing to the elder daughter by the deed poll of August 4, 1904, a sum of 8600*l.*, which was exactly equal to the total of the two amounts, 1600*l.* and 7000*l.*, which had been appointed to the younger daughter in 1902 and in 1904.

There the matter rested. Lady Hood had carried out the intention which she had in mind when she had given these instructions to her solicitor in the summer of 1904. In the month of March, 1908, there was a change of solicitors acting for the trustees of the Mackinnon settlement, and when the new solicitor, who was about to be instructed to take up the papers connected with that settlement, was investigating how matters stood in relation thereto, he not unnaturally had recourse for information to the firm who had throughout represented the trustees of the parents' marriage settlement, and at an interview which he had with the plaintiff's solicitor in March, 1908, he, on hearing that there were appointments in favour of the younger daughter, informed the plaintiff's solicitor that there had also been an appointment, on the occasion of her marriage, in favour of the elder daughter.

That was the first time the plaintiff's solicitor had any knowledge that such earlier appointment had been executed, and he, of course, at once appreciated that his want of knowledge of

the existence of the earlier appointment had led him into preparing a deed, namely, the deed poll of August, 1904, the effect of which was not to carry out the real intentions of his client Lady Hood, but to bring about a state of things which was inconsistent with her declared intention, and which would also create difficulty in that, if that appointment became operative, the donees of the power of appointment had purported to appoint sums of money considerably in excess of the whole trust funds. He thereupon communicated with Lady Hood, and this action was at once commenced.

From what I have stated, I think I have made this much clear, that the sole origin of the deed poll of August 4, 1904, was the intention of Lady Hood to bring about equality between her daughters, and that although, in form, the transaction takes the form of appointing a sum of 8600*l.* to the elder daughter, in substance it was to be such an appointment as should give to the elder daughter an interest in the funds subject to appointment equal to that which had already been given to the younger daughter. Further, when Lady Hood gave those instructions and when she executed that deed poll she had no recollection of the fact that she had already been party to an appointment to her elder daughter of a moiety of the fund.

Now the question is whether, in that state of facts, I can, consistently with the law, say that such a mistake on the part of the appointor entitles her to have the deed rescinded. I accept Mr. Lawrence's argument that whether it is rescission or whether it is rectification is only a question of degree. If the Court comes to the conclusion that the plaintiff is entitled to relief, then whether the proper relief be reformation or rescission is really immaterial, because whatever is the proper and necessary relief the Court is bound to give it.

The mistake made was that Lady Hood forgot that she had been a party to the joint appointment made by her husband and herself. Accepting, as I do, her evidence that she had in fact forgotten it, it is perhaps not necessary to say that it is not unnatural that she had forgotten it. At that time her husband was in receipt of the income; Lady Hood, has a very vague idea as to the items of which the trust fund consists; she knows that

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it is a substantial sum, because she receives a substantial income from it, but she is a lady who, like many others, is content to leave the administration of her pecuniary affairs in the hands of those whom she is able to trust. Therefore I think there is nothing in the least unlikely or improbable in her statement that she had forgotten altogether about the execution of this deed; and even to-day, although she recognizes her signature, she is unable to recall any incident connected with the execution of it.

It is not however, material, for me to consider these points, because I accept her statement that she executed this second deed in entire forgetfulness of the earlier deed. Now is such forgetfulness such a mistake as entitles a party seeking to reform or rescind a deed to relief? Courts of first instance have pointed out, and the Court of Appeal has pointed out, that there is no satisfactory definition of what mistake is. Lord Esher M.R. in *Barrow v. Isaacs & Son* (1) says this: "Now, having thought over this matter, and looked into all the cases, I can find no definition of what 'mistake' is; but if you treat mistake in its ordinary sense in the English language, is mere forgetfulness mistake? Can you, in English, say 'I forgot,' and is that the same thing as saying 'I was mistaken'?" Then his Lordship goes on to say: "Both those questions depend on something happening in the mind of the person, and you have to see what it is that happens in his mind. If he merely forgets, he does not assume that one state of things exists whereas some other state of things exists: it is a mere passive state of mind; he has forgotten—he has not thought that one thing was in existence, whereas something else was in existence." With the greatest possible respect to Lord Esher, I do not quite follow that. It seems to me that when a person has forgotten the existence of a pre-existing fact, and assumes that such fact did not pre-exist, he is labouring under a mistake, and he acts on the footing that the fact really did not pre-exist; and, venturing to criticize the language of Lord Esher, I should have thought that a man makes a mistake in forgetting an existing fact quite as much as he does in assuming a state of things to exist which does not in fact exist. However, that is the view which the learned Master

(1) [1891] 1 Q. B. 420.

of the Rolls then took, but it is not a view which I find is acquiesced in by Kay L.J., whose judgment was adopted by Lopes L.J., in the same case, because Kay L.J. says this (1): "The questions are (1.) whether the facts I have described amount to mistake; and, if so, (2.) whether in its discretion, the Court will relieve." The point there was that the solicitor, forgetting there was a head lease which ought to have been consulted upon the question whether the licence of the superior landlord was a necessary condition precedent to an assignment, had carried out a transaction without referring to the head lease and without obtaining the licence. I need not consider the second question which Kay L.J. asks, but he says with regard to the first: "Very wisely, as I presume to think, the Courts have abstained from giving any general definition of what amounts to mistake. It is an easily arguable question whether mere forgetfulness of such a covenant—even if not negligent—can properly be called mistake. The case of *Kelly v. Solari* (2), however, and the observation of Lord Blackburn in the House of Lords in *Brownlie v. Campbell* (3) establish that, in an action to recover money paid by mistake, it is sufficient to prove that at the time of the payment the person paying was actually ignorant that the money was not due, although he had the means of knowledge, and it was owing to his own carelessness or forgetfulness, that he was in fact ignorant. There undoubtedly forgetfulness of the previous payment is treated as mistake." Then he goes on, as Mr. Whinney has quite properly pointed out, to say that in those cases, that is, the payment over again of money, there was this additional element, that the payee was in possession of money of which he ought not to be allowed to remain in possession, and therefore the Court could not allow him to retain that to which he was not entitled. But, on the other hand, there is the distinct statement by the Lord Justice that forgetfulness of the previous payment is treated as mistake in the cases to which he refers.

Having regard to the facts which I have stated, I must assume that Lady Hood, intending only to bring about equality between

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(1) [1891] 1 Q. B. 425.

(2) 9 M. & W. 54.

(3) 5 App. Cas. 952.

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her daughters, was labouring under a mistake when she thought that equality would be brought about by the execution of the deed appointing 8600*l.* to her elder daughter. It was obviously a mistake, because the effect of the execution of that deed was to bring about that which Lady Hood never intended and never contemplated. I think she executed the deed under a mistake with regard to the existing facts, and I cannot myself see that it is material whether that mistake arose from her being misinformed as to the true state of things, or from her state of mind being such that she had not, at that moment, knowledge of the true state of things. The absence of knowledge arose from her not bearing in mind, or not appreciating, that she had already appointed to the elder daughter a moiety of the fund, and in these circumstances I feel bound to hold, and, having regard to the evidence, I am glad to be able to hold, that this deed which it is sought to rescind was executed by Lady Hood under a mistake brought about by such circumstances as entitle her to the relief she seeks. Accordingly I make an order that the deed be rescinded and set aside; and I think it would be a wise expedient if there was now indorsed on the original settlement a note of the three appointments which have been made and which stand, and also a note of the appointment with which I am now dealing, and a copy of the order which I am now making rescinding that last appointment, and I so direct.

Solicitors: *Iliffe, Henley & Sweet; Radcliffe, Cator & Hood.*

G. M.

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[MANCHESTER DISTRICT REGISTRY.]

[1908 H. 4000]

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Jan. 16, 30.

Will—Construction—Annuities—Direction to pay out of Income—Indefinite Period—Absolute Gift of Corpus “subject to the aforesaid Annuities”—Continuing Charge on Income.

The testator gave the residue of his estate to his brother on trust “to pay out of the income thereof the sums following that is to say” one clear annuity to each of the three defendants for her sole and separate use without power of anticipation, “and subject to the aforesaid annuities” the testator directed his residuary estate to be held upon trust for his said brother absolutely, or if he should die in the testator’s lifetime, then “subject to the aforesaid annuities” upon trust for the issue of his said brother living at the testator’s death.

The income of the estate had recently proved insufficient for the payment in full of the annuities, which had fallen into arrear:—

Held, that “subject to the aforesaid annuities” meant subject to the payment of the annuities, and that the annuities were a continuing charge upon the income of the estate until they were paid in full.

Booth v. Coulton, (1870) L. R. 5 Ch. 684, followed.

In re Boden, [1907] 1 Ch. 132, and *In re Bigge*, [1907] 1 Ch. 714, distinguished.

ADJOURNED SUMMONS.

By his will William Howarth, the above-named testator, appointed his brother George Howarth trustee and executor thereof, and devised and bequeathed all his real estate and the residue of his personal estate unto and to the use of his said trustee, his heirs, executors, administrators, and assigns, upon trust that his said trustee, his heirs, executors, administrators, or assigns, or other the trustee or trustees for the time being of his will, should sell, call in, and convert the same as therein mentioned and hold the proceeds and moneys so to be received and gotten in “Upon trust to pay out of the income thereof or out of the income of my said real and leasehold estates until the same shall be sold the sums following that is to say one clear annuity or yearly sum of 500*l.* unto Mary Alice Makinson the

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same to be for her own sole and separate use and without any power for her to alien or anticipate the growing payments thereof and to be paid to her free from legacy or other duty by four equal quarterly payments in each year" on the usual quarter days, and the will proceeded to give one clear annuity of 260*l.* to the defendant Elizabeth Dudgeon and one clear annuity of 156*l.* to the defendant E. S. S. Martin, to be payable by weekly payments, but otherwise in terms precisely similar to those of the gift of the previous annuity to the defendant M. A. Makinson, "and subject to the aforesaid annuities" the testator directed that the trustee should hold the said moneys to arise and be received as aforesaid upon trust for his said brother George Howarth absolutely, and in the event of George Howarth's death in the testator's lifetime, then "subject to the aforesaid annuities" upon trust for George Howarth's issue living at the testator's death.

The testator died on September 27, 1887, and his will was proved by George Howarth on March 13, 1888. George Howarth died on June 26, 1889, having by his will appointed the plaintiffs, Edna Howarth, George Shorland Ball, and John Brooks, executors and trustees thereof, all of whom proved the will, and ever since had acted as trustees of the will of William Howarth.

Since June 30, 1906, the income of the testator's estate had been insufficient to keep down the three annuities, which had fallen into arrear to the extent of 147*l.* 13*s.* 1*d.*

The plaintiffs accordingly took out this summons for the determination of the question whether the several annuities were a charge upon the corpus or only upon the income for the time being of the testator's estate, and whether the said annuitants were entitled to have the arrears of their respective annuities and the deficiency between the income of the testator's estate and the amount of the said annuities raised out of his estate.

Hughes, K.C., and *Clarkson*, for the plaintiffs. There is no other gift of the annuity than the direction to pay out of income, and but for the gift over it would seem to be clearly a trust to pay out of income and nothing else. In *Birch v. Sherratt* (1)

(1) (1867) L. R. 2 Ch. 644.

Lord Cairns L.J. thought that but for the words of the gift over, which were much stronger than in this case, there would have been no continuing charge on income and no charge on corpus.

In both the recent cases of *In re Boden* (1) and *In re Bigge* (2) there was a direction to pay out of income, and the gift over was "subject to the trusts aforesaid," and it was held that there was no charge on corpus and no continuing charge on income; and we submit that those decisions are applicable to and govern this case.

Younger, K.C., and *Radford*, for the first defendant. There is no reference in this gift to the life of the annuitant. We do not say that the annuity is to be perpetual, but there is no reference to the duration of her life. That is important; the gift is left perfectly general. This is not the case of a gift to the trustees of the income during the life of the annuitant on trust to pay the annuity; it is a gift to them of the corpus and income for the purpose of discharging the annuity.

We put our case on two grounds. First we submit that, apart from the gift over, there is a charge on corpus by reason of the indefinite gift out of income: *Phillips v. Gutteridge* (3); *Stelfox v. Sugden*. (4)

In *Stelfox v. Sugden* (4) there was, as here, no limitation of the period during which the interest was to be received, but there was a gift to other persons of the surplus income during the life of the annuitant, and Wood V.-C. said that but for that gift of surplus income the annuity would have been a charge on corpus, and it was mainly because of that gift that he held there was no charge of the annuity on corpus.

Further we submit that there is a charge on corpus by reason of the gift over "subject to the aforesaid annuities": *Birch v. Sherratt* (5), where the words were "from and after payment" of the annuities "and subject thereto."

In *Booth v. Coulton* (6), where the tenant for life of the surplus income was still alive and the gift over was "subject as

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(1) [1907] 1 Ch. 132.

(2) [1907] 1 Ch. 714.

(3) (1862) 3 D. J. & S. 332.

(4) (1859) John. 234.

(5) L. R. 2 Ch. 644.

(6) L. R. 5 Ch. 684.

JOYCE J. aforesaid," there was held to be a continuing charge on income, and we submit that there must be at least as much in the present case, although we submit that there is more than a continuing charge on income, namely, a charge on corpus.

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In *Wormald v. Muzeen* (1) Fry J. held that there was a continuing charge on income, but on appeal (2) his decision is reported to have been reversed, Jessel M.R. holding that there was no charge on corpus.

[JOYCE J. The reports of that case are altogether unsatisfactory and I shall pay no attention to it.]

In re Boden (3) and *In re Bigge* (4) are distinguishable. In those cases the words were "subject to the trusts aforesaid," and in the former case Vaughan Williams L.J., in dealing with *Birch v. Sherratt* (5), intimated that if the gift over had been after full payment and satisfaction of the annuity he would have construed the will as creating either a charge on corpus or a continuing charge on income. Here the words are "subject to the aforesaid annuities," which mean "subject to the full payment and satisfaction of the annuities," and create, as we submit, a charge on corpus, or, if not, then at least a continuing charge on income.

T. C. Eastwood, for the other defendants.

Hughes, K.C., in reply. *Booth v. Coulton* (6) was the decision of Giffard L.J. alone, and it was admitted that there was no charge on corpus. (7) If there is any inconsistency between the decisions in *Booth v. Coulton* (6) and *In re Boden* (3), I submit that the decision in the latter case should be followed. It was followed by Neville J. in *In re Bigge* (4), on which I also rely.

JOYCE J. The only doubt I feel about this case is whether the annuities are not charged on the corpus. I am of opinion, however, that they are charged upon the income.

In this will there is no direction for payment of the annuities

(1) (1881) 17 Ch. D. 167.

(2) [1881] W. N. 83; 50 L. J. (Ch.) 776; 29 W. R. 795.

(3) [1907] 1 Ch. 132.

(4) [1907] 1 Ch. 714.

(5) L. R. 2 Ch. 644.

(6) L. R. 5 Ch. 684.

(7) 39 L. J. (Ch.) 622.

out of the annual income; the payment of the annuities is not limited to each or any particular year, and there is no gift of surplus income to a tenant for life or anything of that sort.

In my judgment this case is governed by the decision in *Booth v. Coulton*. (1) That was the decision of the Court of Appeal and of a very learned judge; it is in my opinion perfectly good law, and so far as I know has never been seriously questioned. Sir George Jessel certainly approved of it. He says in *In re Mason* (2): "Now there are two classes of cases between which I think a distinction should be made. The first is a class of cases of which *Baker v. Baker* (3) is an instance, in which the testator has not given the annuity at all, but has directed a sum of money to be set apart which shall be sufficient to pay an annual sum, and then directs the income of the sum so set apart to be paid to a person for life. That is not a gift to an annuitant of a sum of money specifically mentioned, but it is a direction to set apart a capital sum, and what is given, and what the person to whom the income is to be paid takes, is the income of that capital sum which accrues due during his life, and nothing else. That is the true explanation of the decision in *Baker v. Baker*. (3) There is another class of cases of which *Booth v. Coulton* (1) is one, in which there is not a gift of an annuity simpliciter, but a fund is directed to be invested, or there is an existing investment, or an existing estate producing income, and the testator directs that out of the income of the sum to be invested, or of the existing investment, or out of the rents of the existing estate, a life annuity is to be paid, and subject thereto the fund or estate is to go elsewhere. That class of cases has been held to mean this, that, there being no direction that the annuity is to be paid out of the income to accrue during the life of the annuitant, the annuity is a charge upon the income even beyond the life of the annuitant, so that no one can take the income till the arrears of the annuity are satisfied."

Now, in my opinion, the words "subject to the aforesaid annuities" or "subject thereto" mean subject to the payment of the annuities. That was, I think, Sir G. Jessel's view and

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(1) L. R. 5 Ch. 684.

(2) (1878) 8 Ch. D. 411, 414.

(3) (1858) 6 H. L. C. 616.

JOYCE J. Lord Cairns L.J. in *Birch v. Sherratt* (1), says: "I think the natural meaning of the words 'from and after the payment of the said annual sum,' is, 'from and after full and complete payment of the said annual sum of 100l.,' and the natural meaning of the words 'subject thereto,' is, 'subject to the full and complete payment thereof.'" There are other authorities, I believe, to the same effect.

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I am of opinion that the words "subject to the aforesaid annuities" here mean "subject to the payment of the annuities," and that those words distinguish this case from *In re Boden* (2) and *In re Bigge* (3), where the words were "subject to the trusts aforesaid." In the present case I follow the decision in *Booth v. Coulton* (4) and hold that these annuities are a continuing charge upon the income until they are paid in full.

Solicitors: *Wm. Eaton, Manchester*; *Wm. Eaton, for F. Lawson Lewis, Eastbourne.*

(1) L. R. 2 Ch. 644, 648.

(2) [1907] 1 Ch. 132.

(3) [1907] 1 Ch. 714.

(4) L. R. 5 Ch. 684.

In re CONSOLIDATED SOUTH RAND MINES DEEP,
LIMITED.

SWINFEN
EADY J.

[0012 of 1909.]

1909

Feb. 2, 3.

Company — Voluntary Winding-up — Amalgamation and Reconstruction — Unfair Scheme — Dissident Minority — No Agreement executed — Contributory's Petition impeaching Scheme — Compulsory Order — Companies Act, 1862 (25 & 26 Vict. c. 89), s. 161.

Where a scheme for the voluntary winding up and amalgamation of company A and company B by sale and transfer of their assets to a new company under s. 161 of the Companies Act, 1862, is eminently unfair to the independent minority of company A, and is only passed as regards company A by means of a large majority of shares held by company B, which alone is benefited by the scheme, then, if no agreement for the sale to the new company has been actually executed, the Court will at the instance of the minority of company A stop the scheme by making a compulsory order to wind up that company, and will not leave that minority to their remedy of being paid out as dissentient members under s. 161.

PETITION.

The above company, hereinafter called the South Rand Company, was incorporated on April 4, 1902, with a capital of 800,000*l.* divided into 800,000 *l.* shares, of which 525,000 were issued and paid up or credited as paid up. It was incorporated to purchase 773 mining claims on the Rand deep levels from Henderson's Transvaal Estates, Limited, hereinafter called the Henderson Company, and to prospect and develop them.

The purchase price was 425,000*l.*, of which 97,000*l.* was paid in cash and 328,000*l.* by the issue of 328,000 fully-paid *l.* shares to the Henderson Company.

From 1902 to 1904 the South Rand Company issued 145,000 more shares for cash, of which 100,000 were issued at 5*s.* premium, so that the company obtained a considerable working capital.

In 1906 the Henderson Company entered into arrangements to sell their holding, which was then 380,005 shares, to the Estate Finance and Mines Corporation, Limited, hereinafter called the

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Estate Company, for 64,000*l.* cash. In contemplation of this purchase the Estate Company desired that their own nominees should be made directors. On November 2, 1906, an extraordinary meeting of the South Rand Company convened by the Henderson Company was held, at which the existing directors, including the petitioner, were removed, and Conybeare, Whitfield, and Doudney, the nominees of the Estate Company, were elected directors, the necessary resolutions being carried by the preponderating votes of the Henderson Company.

The new board then advanced 64,000*l.* to the Estate Company to enable them to complete their purchase. The purchase was completed and the 380,005 shares were transferred to Wills and Conybeare as trustees for the Estate Company. The Estate Company had paid interest on the loan and had also paid off 2000*l.* principal. They still owed 62,000*l.*, which was admittedly a good debt, and they or their trustees now held 388,390 shares in the South Rand Company.

In 1908 a scheme of voluntary liquidation and amalgamation was put forward under which the assets of the South Rand Company, the Estate Company, and the Consolidated Rand Rhodesia Trust and General Exploration Company, Limited, hereinafter called the Rand Rhodesia Company, were to be transferred to a new company, to be called the British and Colonial Investments, Limited, hereinafter called the new company, to be formed with a capital of 350,000*l.* divided into 700,000 10*s.* shares. The consideration was to be 626,647 shares divided as follows. The Estate Company were to have 467,669 fully-paid shares, nominal value 233,834*l.* The Rand Rhodesia Company were to have 27,728 shares, nominal value 13,864*l.* The South Rand Company were to have 131,250 shares, nominal value 65,625*l.* The new company were to discharge all liabilities. At this time the South Rand Company had 85,915*l.* liquid assets, including the 62,000*l.* owing by the Estate Company. They also held the 773 mining claims, for which they had paid 425,000*l.* in cash and shares, and on which they had spent 17,000*l.* on development and prospecting works and boreholes in 1903-1905, and 2000*l.* a year for licences to keep the claims on foot. No work had been done since 1905. The proposal was that they

should sell the 85,915*l.* liquid assets and the mining claims for shares of the nominal value of 65,625*l.*, but possibly worth about 13*s.* 9*d.* a share, or 90,234*l.* if the liquidator's estimate of the respective assets was correct.

On December 23, 1908, special resolutions were passed for the voluntary winding up of the South Rand Company, authorizing the liquidator to consent to the registration of the new company, approving a draft agreement embodying the scheme, and authorizing the liquidator, pursuant to s. 161 of the Companies Act, 1862, to enter into that agreement with the new company when incorporated.

These resolutions were carried on a poll by 393,866 votes against 94,549, the holders of 36,585 shares not voting. The 393,866 included the 388,390 shares held by the Estate Company or their trustees, so that there were only 5476 independent shares in support of the resolutions. A few proxies, mostly opposed to the scheme, were rejected, but even without these the large majority of independent shareholders were against the resolutions.

At this meeting Conybeare, the chairman, referring to the 773 mining claims, said, "As to those claims, although I think there is no doubt that in future they will be of considerable value, yet they cannot be dealt with at the present time. It would be, I think, a waste of the capital of the company to attempt development work on those claims at present, but it is quite certain that those claims cannot be maintained without paying the claim licences upon them."

For the purposes of the scheme the value of the mining claims was in fact disregarded.

On January 7, 1909, the resolutions were confirmed. Similar resolutions were passed by the Estate Company and the Rand Rhodesia Company.

On January 8, 1909, the petitioner, who held 863 shares and had voted against the resolutions, presented this petition for a compulsory order to wind up the South Rand Company on the ground that the scheme was unfair and the independent shareholders would be gravely prejudiced by the voluntary winding-up. The holders of 97,479 shares had given notice of dissent under

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s. 161, and out of these the holders of 95,536 shares appeared in support of the petition. The petitioner had not given notice of dissent.

The chairman of the South Rand Company gave evidence to the effect that the directors had carefully considered the scheme and thought it fair. They had estimated the value of the other companies' assets from information supplied by those companies and had taken no independent reports. The mining claims of the South Rand Company would be of considerable value when developed in the future, but at present they were costing 2000*l.* a year to keep up, and their present value as a marketable asset was so small and difficult of estimation that the directors had thought it better to disregard it for the purposes of the scheme. He suggested that the South Rand Company would benefit by a saving in directors' fees and working expenses, but this point was not substantiated.

According to an estimate made by the liquidator for the assistance of the Court, the Estate Company's assets were 327,126*l.*, the Rand Rhodesia Company's assets were 18,462*l.*, and the South Rand Company's assets were 85,915*l.*, so that the new company's assets would be 431,503*l.*, and the 626,647 shares would be worth about 13*s.* 9*d.* a share. In this estimate the South Rand Company's mining claims and machinery were entered as nil. The estimate was, however, only made up from the company's books and without any independent valuations, and no ground for disregarding the value of the mining claims was given, so that the estimate was of very little weight.

Rufus Isaacs, K.C., Gore-Browne, K.C., and Fischer Williams, for the petitioner. The scheme is manifestly unfair to the independent shareholders of the South Rand Company, whose assets are obviously undervalued. It is no doubt to the advantage of the Estate Company, who will be relieved from their 62,000*l.* debt. Having regard to the liquidator's view as to the value of the mining claims, i.e., nil, the remedy of dissentient shareholders under s. 161 is quite inadequate. There is a considerable risk that they will be paid out on the footing that those claims are valueless. The whole matter requires thoroughly looking into,

and the scheme should be stopped by means of a compulsory order. SWINFEN
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Jenkins, K.C., W. F. Hamilton, K.C., and A. M. W. Wells, for the South Rand Company and the liquidator. This is the first time the Court has been asked to make a compulsory order merely to defeat a scheme under s. 161. If the agreement had been executed, there would be no jurisdiction to do it apart from misconduct of the liquidator, which is not alleged: *In re Imperial Bank of China, India, and Japan* (1); *In re Financial Corporation* (2); *In re International Life Assurance Society*. (3)

In the present case the agreement has not been executed, and therefore the Court has jurisdiction. But the question is whether apart from something approaching fraud the Court ought to interfere with a scheme under s. 161 merely on the ground of undervalue. The resolutions were no doubt carried by the Estate Company against a considerable minority of the other shareholders, but the Estate Company were the largest shareholders and were entitled to carry the resolutions. The minority are amply protected by the provisions of s. 161, and for the most part they have given notice to the liquidator either to abstain from carrying the resolutions into effect or to pay them out. All this is a matter of internal management with which the Court should not interfere. The proviso at the end of s. 161, that "if an order be made within a year for winding up the company by or subject to the supervision of the Court, such resolution shall not be of any validity unless it is sanctioned by the Court," is intended for the benefit of creditors. It is not intended to give contributories an additional remedy by petition.

In *In re Irrigation Company of France* (4) James L.J. says: "It has been laid down in several cases that this Court will not, upon the application of a contributory, interfere with a voluntary winding-up unless there be some case of fraud or overbearing influence in obtaining the winding-up resolution. If there be a case of that kind, the Court may think it right to continue the winding-up under supervision, which appears to me to be going as far as the Court ought to go where the question arises only

(1) (1866) L. R. 1 Ch. 339.

(2) [1866] W. N. 162.

(3) (1868) 20 L. T. 433.

(4) (1871) L. R. 6 Ch. 176, 186.

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between a contributory and his co-contributories." The jurisdiction is one that the Court ought not too easily to exercise: *In re Gold Co.* (1); *In re National Distribution of Electricity Co.* (2); and if anything is done on this petition, there should at most be a supervision order.

The shareholders who have given notice of dissent have properly adopted the remedy provided by s. 161 and should not be heard in support of the petition. The petitioner, who has not given notice of dissent, is bound by the resolutions. Apart from anything approaching fraud, it is immaterial whether the basis of the amalgamation is actually fair or not. It was bona fide. If really unfair, it will be set right on the arbitration under s. 161. No one will be bound by the liquidator's estimate.

G. A. H. Branson, for contributories supporting the petition.

Martelli, K.C., and *O'Hagan* watched the case for the new company.

Rufus Isaacs, K.C., in reply. It is not necessary for the petitioning contributory to prove fraud in the passing of the resolutions. If the voluntary liquidation is likely to prejudice the shareholders the Court will make the order: *In re National Distribution of Electricity Co.* (3) Special circumstances not amounting but almost equivalent to fraud, e.g., that the voluntary winding-up was obtained by an overpowering body of shareholders acting under the influence of a single person, would be a ground for a compulsory order: *In re Gold Co.* (4), adopted in *In re National Distribution of Electricity Co.* (3) In the present case the facts speak for themselves; 85,915*l.* liquid assets and 773 mining claims that cost 425,000*l.* are to be handed over for shares of the nominal value of 65,625*l.* on the footing that the claims are worthless. The South Rand Company ought obviously to have a larger proportion of the new company's shares.

Sect. 161 is no bar to the petitioner, who has not availed himself of the remedy thereunder. It is also no bar to the dissentient shareholders, who wish the liquidator to adopt the first alternative under the section and abstain from carrying the

(1) (1879) 11 Ch. D. 701.

(2) [1902] 2 Ch. 34, 43, 45.

(3) [1902] 2 Ch. 39, 44, 45.

(4) 11 Ch. D. 717.

resolutions into effect. The remedy by arbitration involves considerable expense, and the matter can be far better investigated and dealt with on a compulsory order.

SWINFEN EADY J. (after stating the facts). The price payable to the South Rand Company under the scheme is 131,250 10s. shares, or 65,625*l*. A question was put to the chairman, Mr. Conybeare, with regard to the negotiations leading up to this arrangement and as to how the figures were arrived at representing the price to be paid to the South Rand Company, but he could only give a general answer to the effect that the directors had considered it and thought it fair and proper. Now at the meeting to consider the winding-up resolutions and the proposed amalgamation the chairman referred to these mining claims and said, "As to those claims, although I think there is no doubt that in future they will be of considerable value, yet they cannot be dealt with at the present time." He adhered to that view in his evidence.

I have endeavoured to ascertain how this sum of 65,625*l*. which the South Rand Company are to receive is arrived at. The liquidator has made an affidavit in which he sets out the value of the liquid assets of this company as 85,915*l*., and he treats the mining claims and the machinery as of no value. Now in addition to the original 425,000*l*. which the South Rand Company paid for these mining claims they have spent 17,000*l*. in development works and boreholes for ascertaining the value of the property; there is machinery and plant there, buildings and furniture. The liquidator has estimated that property as of no value. The chairman in his evidence said that the directors considered it right and proper to pay 2000*l*. a year, the expense of the licences and other payments necessary to keep the claims on foot, and they were paid up to the date of the winding-up. He did not agree with the view of the liquidator that this property was of no value whatever, and when one sees that liquid assets of 85,915*l*. together with these mining claims, costing so large a sum, are being sold for 65,625*l*., payable in shares, one has to look a little more closely and see how this sale is being brought about and what it really means. Looking at it, therefore, more closely,

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it appears that this is a proposal to sell to a new company in which the Estate Company will have by far the larger share holding; they propose to bring in their own property and to receive in respect of that 467,669 shares as against 131,250 allotted to the South Rand Company. So that they have a preponderating voice in the new concern; the management of the new concern passes to them. The independent shareholders, with almost entire unanimity, are against the scheme. Shareholders holding 95,536 shares support the petition and ask for a compulsory order. It is said that they and some others who do not appear, amounting in the whole to 97,479 shares, have given notice under s. 161 to the liquidator either to abstain from carrying the resolutions into effect or to purchase their interest, and therefore have their remedy under that section; but the mere fact that they have given that notice does not prevent them from coming and supporting a winding-up petition and asking that the earlier alternative shall be enforced by means of a compulsory winding-up when the resolutions cannot be carried into effect without the sanction of the Court. No independent shareholders oppose the petition. The resolutions at the meeting were practically carried by the Estate Company holding 388,390 shares, supported only by the holders of 5476 shares, as against 94,549 opposing. A few proxies were rejected, the majority of whom were opposed to the scheme.

Now I have looked closely at this scheme of amalgamation, and it seems to me eminently an unfair one, and one in which the shareholders of this company are not fairly and properly treated. The scheme is manifestly to the interest of the Estate Company. That has not been concealed. They will not have to find the 62,000*l.*, which at present is a legal debt due from them. The fact that it is for their benefit is admitted, but it is said that it is also for the benefit of the others. When the chairman was pressed as to how it would benefit the South Rand shareholders he said that the directors' fees and working expenses would be less. It did not, however, appear that the directors' fees would be less, and it appeared that the chairman knew nothing at all of the working expenses of the other companies or in what way there would be any saving whatever. He seemed to know no

more about that than he knew as to the way the price payable to the South Rand Company was arrived at.

In these circumstances I am satisfied that it would be a positive injustice to these shareholders to allow the voluntary winding-up to continue in the present position. They certainly will be prejudiced by the continuance of the voluntary winding-up. Then it is said that, even if that is the case, it is not a proper case in which to make a compulsory order, and that a supervision order is sufficient. I am quite unable to accept that view. I can see that the shareholders may be placed in a position of considerable difficulty if I were to adopt that view, and I think the proper order to make is a compulsory order. The effect of that will be that under s. 161 the scheme will not go through unless and until it is sanctioned by the Court. It is said that the Court ought not to make this order unless it sees that some advantage will accrue to these shareholders, i.e., that they will get more by means of a compulsory order than they will if they are bought out as dissentient shareholders. If there is a compulsory order these deep level mining claims which have cost so much, will be dealt with by the liquidator in the winding-up, and they may realize a very considerable sum. If it is necessary to realize them, they will be realized in the winding-up.

The observations of James L.J. in *Menier v. Hooper's Telegraph Works* (1) have a substantial bearing on the present case. The effect of refusing a winding-up or refusing any relief on this petition and allowing the scheme of amalgamation to stand would really enable the majority of the shareholders, namely, the Estate Company, to appropriate, if not the whole, a considerable part of the South Rand Company's property. I am quite satisfied that the justice of the case requires that a compulsory order should be made, and I therefore make the ordinary compulsory order.

Solicitors: *Linklater, Addison & Brown; Ashurst, Morris, Crisp & Co.*

(1) (1874) L. R. 9 Ch. 350, 353.

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[1908 L. 2943.]

Local Education Authority—Council of County Borough—Corporation acting by Council—Education Act, 1902 (2 Edw. 7, c. 42), s. 1—Education (Administrative Provisions) Act, 1907 (7 Edw. 7, c. 43), s. 1—Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 15.

In s. 1 of the Education Act, 1902, which enacts that “for the purposes of this Act, the council of every county and of every county borough shall be the local education authority,” and throughout the Act, the words “council of a borough” are used for “the mayor, aldermen, and burgesses acting by the council.” The council were not incorporated as a separate body by that Act. Therefore land which the council have agreed to acquire under the powers and for the purposes of the Education Acts must be conveyed to the mayor, aldermen, and burgesses.

Hyde Corporation v. Bank of England, (1882) 21 Ch. D. 176, followed.

THE Leeds Institute of Science, Art, and Literature were the “managers” within the meaning of the Schools for Science and Art Act, 1891 (54 & 55 Vict. c. 61), of an institution to which the Literary and Scientific Institutions Act, 1854 (17 & 18 Vict. c. 112), applied, and had power under the first-named Act to transfer their schools.

The city of Leeds was a county borough within the Education Act, 1902 (2 Edw. 7, c. 42), s. 1, which provides that “For the purposes of this Act, the council of every county and of every county borough shall be the local education authority.” The municipal corporation of the city of Leeds, whose name under a local Act (62 & 63 Vict. c. cclxiii.) was “the Lord Mayor, aldermen, and citizens of the city of Leeds,” were a corporation to which the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), applied, and acted by a council as provided by s. 10 of that Act.

By an agreement in writing dated July 18, 1907, signed by the agent of the trustees of the institute and confirmed by a

resolution of the city council, it was agreed, for the considerations therein mentioned, that certain freehold property vested in the trustees should be transferred to the city council, and that a long lease of part of the property should be regranted to the trustees at a peppercorn rent. This agreement was made with the city council as the local education authority.

The town clerk, on behalf of the council, submitted to the trustees a draft conveyance of the property to "the Lord Mayor, aldermen, and citizens of the city of Leeds." The trustees of the institute refused to accept this draft, contending that the Leeds City Council, and not the corporation, were the local education authority, and that the conveyance ought to be made to, and the lease granted by, the city council. The trustees of the institute took out this summons for a declaration that the local education authority for the city of Leeds was the Leeds City Council, and not the Lord Mayor, aldermen, and citizens acting by their council, and that the latter body had no power to acquire and hold the real estate described in the contract, or to grant a lease thereof after a conveyance.

It was admitted that the contract was binding, and there was no dispute between the parties except as to the body to whom the property was to be conveyed.

Micklem, K.C., T. P. Perks, and Arthur May, for the trustees. Sect. 1 of the Education Act, 1902, makes the council of every county borough the local education authority. That means the council literally, not the Lord Mayor, aldermen, and citizens acting by the council. The Education Act, 1902, s. 5, by giving the local education authority the powers of school boards, enabled them to acquire land for the purposes of Part III. of the Act (Elementary Education); and the Education Act, 1907, s. 1, gives the local education authority the same powers of acquiring land for the purposes of Part II. of the former Act (Higher Education) as they had for the purposes of Part III. County councils were incorporated by the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 79, and s. 31 makes certain boroughs county boroughs; that would seem to incorporate their councils. Express words of incorporation are not necessary.

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The Schools Sites Acts, 1841 and 1844, contained provisions for vesting lands in the minister and churchwardens without words of incorporation. The Education Act, 1902, creates new bodies, "local education authorities," and enables them to acquire land. It must be deemed to have incorporated those bodies so far as necessary. There is nothing in the Education Acts to suggest that "council" means the corporation of the borough. It is attempted to bring that meaning in by virtue of the Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 15. But that section only provides that "any reference to the powers, duties, liabilities, or property of the council of a borough shall be construed as a reference to the powers, duties, liabilities, or property of the mayor, aldermen, and burgesses of the borough acting by the council." That can only apply to cases where powers, &c., of a council as such are referred to. The Education Act does not refer to the powers or property of the council at all. It creates a new authority, the local education authority, and refers throughout to the powers of the local education authority. The new authority is in s. 1 defined to be the council, and the Interpretation Act cannot be read into a definition clause. In *Hyde Corporation v. Bank of England* (1) Fry J. held that "council" in s. 310 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), meant "the mayor, aldermen, and burgesses acting by their council," but he seems to have come to the conclusion with some difficulty, and he comments on the looseness of the language of the section. That was a case of one corporation being substituted for another. None of Fry J.'s remarks apply here. In *Oldham Corporation v. Bank of England* (2) the point does not seem to have been raised. The language of the Education Acts is not ambiguous or doubtful, and the Court will not decide that it does not mean what it very clearly says.

Hon. F. Russell, K.C., and *H. H. Gaine*, for the city council. The city council are not incorporated, and if the conveyance is to be to them it must be made to all the members by name. That cannot have been the intention of the Legislature. In *Hyde Corporation v. Bank of England* (3) Fry J. came to the

(1) 21 Ch. D. 176.

(2) [1904] 2 Ch. 716.

(3) 21 Ch. D. 181.

conclusion that in the Public Health Act, 1875, the word "council" was used for "the mayor, aldermen, and burgesses acting by the council" because it was so used in previous legislation, particularly in the Public Health Act, 1872 (35 & 36 Vict. c. 79). At the time of the passing of the Local Government Act, 1888, borough councils were governed by the Municipal Corporations Act, 1882. Sect. 10 of that Act provides that "The municipal corporation of a borough shall be capable of acting by the council of the borough, and the council shall exercise all powers vested in the corporation by this Act or otherwise." Sect. 105 gives a corporation power to acquire and hold land, but ss. 106, 107, and 108 enable the council to mortgage the land so acquired, and to purchase land which is to be conveyed to the council, and forbids the council to sell, mortgage, or alienate or lease any corporate land except as therein mentioned. That clearly shews that the Legislature intended the property to be vested in the corporation but administered by the council. And indeed the position was the same under the Municipal Corporations Act, 1835 (5 & 6 Will. 4, c. 76), s. 6, which enacts "That after the first election of councillors under this Act in any borough the body or reputed body corporate named in the schedules in connexion with such borough shall take and bear the name of the mayor, aldermen, and burgesses of such borough, and by that name shall have perpetual succession, and shall be capable in law, by the council hereinafter mentioned of such borough, to do and suffer all acts," &c. The Public Health Acts, 1872 (35 & 36 Vict. c. 79), s. 4, and 1875 (38 & 39 Vict. c. 55), s. 6, appoint as sanitary authorities in boroughs "the mayor, aldermen, and burgesses acting by the council." Then coming to the Local Government Act, 1888 (51 & 52 Vict. c. 41), by s. 31 certain boroughs are defined as county boroughs. By s. 34, sub-s. 1, it is enacted that "the mayor, aldermen, and burgesses of each county borough acting by the council shall subject as in this Act mentioned have and be subject to all the powers, duties, and liabilities of a county council under this Act." By s. 34, sub-s. 2, bridges are vested in the corporation, but the costs of maintaining them are directed to be paid by the council.

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In all these Acts it is plain that the council is regarded merely as the hand by which the corporation administers the property vested in itself. Then in the Education Act, 1902, it is clear that the words "council" and "education authority" are used as interchangeable: see s. 2, sub-s. 1, where powers are given to the local education authority, and s. 2, sub-s. 2, where the council is spoken of as exercising them. Sects. 3 and 4 have the same effect; s. 23, sub-s. 1, speaks of "the powers of the council" to supply higher education which in fact were given to the local education authority. For other instances see s. 17 and s. 5 compared with Sched. II. Every reference to the education authority throughout the Act is a reference to the council, and the Act is full of references to the duties and powers of a council. Then all these references are by the Interpretation Act, 1889, s. 15, sub-s. 1, to be read as references to the Lord Mayor, aldermen, and burgesses acting by the council.

In *Hyde Corporation v. Bank of England* (1) Fry J. decided that the word "council" was used for "mayor, aldermen, and burgesses acting by the council" on the ground that it had been so used in previous legislation. We have shewn that the usage has continued in subsequent legislation, but it is no longer necessary to rely upon that, for the question is settled by the Interpretation Act, 1889. In *Oldham Corporation v. Bank of England* (2) the point was not argued because it was assumed by everybody in our favour.

Micklem, K.C., in reply.

Cur. adv. vult.

Feb. 6. SWINFEN EADY J. This is a summons under the Vendor and Purchaser Act, 1874. The trustees of the Leeds Institute have agreed with the Leeds City Council for the conveyance of certain hereditaments to them as the local education authority for the city of Leeds and for a lease of some portion of the property being regranted to them at a peppercorn rent.

The question raised between the parties and submitted for the judgment of the Court is whether the conveyance should be taken to "the Leeds City Council" or to "the Lord Mayor,

(1) 21 Ch. D. 176.

(2) [1904] 2 Ch. 716.

aldermen, and citizens of the city of Leeds," that being the name of the municipal corporation of the city under the statute 62 & 63 Vict. c. cclxiii.

Both sides treated the question as one of general law, depending mainly on the construction of certain statutes, and neither side relied upon any portion of the contract between the parties, which is a very informal document, called "Headings of the terms of the transfer of the property."

Under the Education Act, 1902, s. 1, the council of every county borough is the local education authority for the purpose of that Act, and the Second Schedule to the Act provides that the property, powers, rights, and liabilities of any school board existing at the appointed day shall be transferred to the council exercising the powers of the school board. Under the Education Act, 1907, s. 1, a local education authority has the same power for the purchase of land, either compulsorily or by agreement, for the purposes of Part II. of the Education Act, 1902, as it has under the Education Act for the purposes of Part III. of that Act.

It was contended by the institute that having regard to these statutory provisions the hereditaments in question must either be conveyed to the "Leeds City Council," which is to be deemed to have been created a corporation or quasi-corporation by virtue of and for the purposes of the Education Acts, or the hereditaments must be conveyed to the persons constituting the individual members of the city council at the date of the conveyance, leaving them on every change in the membership of the council to execute conveyances from time to time to the then existing members. This would be a very inconvenient practice.

On the other hand, it is contended by the respondents that the hereditaments must be conveyed to the Lord Mayor, aldermen, and citizens, who are a corporation, and that the expression "the council of every county borough" used in the Education Act, 1902, is merely a short form of expression for "mayor, aldermen, and citizens acting by their council."

A similar point arose before Fry J. in *Hyde Corporation v. Bank of England*. (1) Under s. 310 of the Public Health

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Act, 1875, the property of a local board in certain events is to pass to and be vested in "the council of such borough." Part of the property of a local board consisted of a sum of Consols. The district of the local board was subsequently constituted a borough, and thereupon the corporation of the new borough claimed that the Consols had become absolutely vested in them. The Bank of England objected and claimed that "the council of a borough" is not a corporation, and that the practice of the Bank was to register stock only in the name of a corporation, or of individuals not more than four in number. Fry J., however, held that the words "the council of such borough" meant the mayor, aldermen, and burgesses acting by the council. He said (1): "Then arises this question. In whom does s. 310 vest the property? The difficulty arises from the words which vest it nominally in the council. It has been contended that it can only vest an equitable interest. The conclusion at which I have arrived is, that, with very considerable inexactitude and looseness of language, the word 'council' is in that section used for the words 'mayor, aldermen, and burgesses acting by the council.' I arrive at that conclusion, because in the previous legislation, particularly in the Public Health Act of 1872 (35 & 36 Vict. c. 79), there are sections which shew that the mayor, aldermen, and burgesses acting by the council are treated by the Legislature and spoken of as the council. [His Lordship referred to ss. 4 and 22 of that Act.] In those cases it appears to me reasonably plain that the intention of the Legislature was, not to create a new body corporate consisting of the council alone, but to transfer to the mayor, aldermen, and burgesses the particular powers in question, to be acted upon and exercised by the council. Inasmuch as the council is the soul and the hand of the corporation, there is no great difficulty in using the words 'the council' for the body for whom they are to act, for whom they are to deliberate, and on whom their decisions are binding. In the same way, in the Act of 1875, there is strong evidence that the Legislature has used the words 'the council' to mean the mayor, aldermen, and burgesses acting by the council. One proof of this is to be found in the 12th section,

(1) 21 Ch. D. 181.

which provides that the property already vested in the council of any borough is to remain vested in the council. But it appears, from an examination of the earlier Acts by the learned counsel on both sides, that, although much property was previously vested in the mayor, aldermen, and burgesses of a borough, no property was vested in the council, and, therefore, if I were to read the word 'council' in its strict and proper sense, and not to hold that it includes 'mayor, aldermen, and burgesses,' that portion of the 12th section would fail of any operation whatever, whereas, if I read it as a short description of 'mayor, aldermen, and burgesses,' the intention of the Legislature has effect given to it; the property was vested in the corporation and it continues vested in the corporation. It is scarcely necessary for me to refer to the many other sections to which my attention has been called but I will only say that in ss. 198, 207, 246, and 270, similar expressions are to be found, which seem to me to import that the Legislature meant by the 'council' the mayor, aldermen, and burgesses, acting by the council. I hold, therefore, that the same meaning must be given to the word 'council' in s. 310, and that the effect of that section is to vest in the mayor, aldermen, and burgesses of the borough of Hyde the right, not only to receive the dividends on, but to effect the transfer of the Consolidated Annuities which were part of the property of the local board before the incorporation of the borough."

Now it is a general principle "that where cases have been decided on particular forms of words, in Courts, and Acts of Parliament use those forms of words which have received judicial construction, in the absence of anything in the Acts shewing that the Legislature did not mean to use the words in the sense attributed to them by the Courts, the presumption is that Parliament did so use them:" see per Lord Coleridge C.J. in *Barlow v. Teal*. (1)

Another statute may be referred to where the expression "the council" obviously means the mayor, aldermen, and burgesses acting by the council, namely, the Local Government Act, 1888. By s. 34, sub-s. 1, the mayor, aldermen, and burgesses of each county borough acting by the council are (subject as in the

(1) (1885) 15 Q. B. D. 403, 405.

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Act mentioned) to have and be subject to all the powers, duties, and liabilities of a county council under that Act. Sect. 34, sub-s. 2, provides that on the appointed day there shall be transferred to the mayor, aldermen, and burgesses of each county borough all such bridges and approaches thereto situate within the borough as were previously repairable by the county, and the costs of the council in repairing such bridges and approaches shall be payable out of the borough fund. Here the liability to repair is imposed on the corporation, and it is obvious that the expression "the costs of the council" means the costs of the mayor, aldermen, and burgesses acting by the council.

This is an instance of Parliament using the expression "the council" in the sense attributed to it by Fry J. In the next year was passed the Interpretation Act, 1889 (52 & 53 Vict. c. 63). By s. 15 of that Act it is provided that in that Act and in every Act passed after the commencement of that Act "the following expressions shall, unless the contrary intention appears, have the meanings hereby respectively assigned to them, namely:—The expression 'municipal borough' shall mean, as respects England and Wales, any place for the time being subject to the Municipal Corporations Act, 1882, and any reference to the mayor, aldermen, and burgesses of a borough shall include a reference to the mayor, aldermen, and citizens of a city, and any reference to the powers, duties, liabilities or property of the council of a borough shall be construed as a reference to the powers, duties, liabilities, or property of the mayor, aldermen, and burgesses of the borough acting by the council."

The recent case of *Oldham Corporation v. Bank of England* (1) is also in point. It was there held by the Court of Appeal that under the Education Act, 1902, a sum of Two-and-a-half per cent. Annuities which had been standing in the name of the school board for Oldham became on "the appointed day" vested in the plaintiffs, the corporation of Oldham. This was so held by virtue of Sched II., clause 1, of that Act, which provides that the property of any school board existing at the appointed day shall be transferred to "the council" exercising the powers of the school board. If the argument addressed to me on behalf of the

(1) [1904] 2 Ch. 716.

institute be well founded, that decision would have been erroneous, as the annuities would have become vested in some new corporation or quasi-corporation, and not in the corporation of Oldham. With regard to the contention that Parliament created "the council" a quasi-corporation for the purpose of the Education Acts, I may point out that where by other statutes Parliament has created a quasi-corporation or a body with only some of the incidents of a corporation it has usually done so in express terms and by apt language. Thus the Act 59 Geo. 3, c. 12, s. 17, provides that land and hereditaments purchased by the churchwardens and overseers of the poor of any parish may be conveyed to the churchwardens and overseers and their successors in trust for the parish, and such churchwardens and overseers of the poor and their successors shall and may "and they are hereby empowered to accept, take and hold, in the nature of a body corporate, for and on behalf of the parish" all such lands, &c. It has been held that this section does not create the churchwardens and overseers a corporation for all intents and purposes so as to give them all the common law incidents of a corporation, but merely provides that they shall hold property in the nature of a body corporate by what has been termed a "species of parliamentary succession": see *Smith v. Adkins* (1); *Johnson v. Hodgson*. (2) Again, under the Schools Sites Act, 1841, grants of land may be made to the minister, churchwardens, and overseers and their successors, and in such case the lands are by the statute vested for ever thereafter in the minister, churchwardens, and overseers for the time being; and under the Schools Sites Act, 1844, grants of land may be made to the minister and churchwardens of any parish to hold to them and their successors. But in the Education Act of 1902 Parliament has not shewn any intention whatever of creating "the council" a separate corporation or quasi-corporation, or of providing in any way for their holding land in perpetuity as a separate body or as if they were a corporation.

I am of opinion that in the Education Act of 1902 the expression "the council" is used as meaning the mayor, aldermen, and citizens acting by their council, and that the local education

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(1) (1841) 8 M. & W. 362, 370.

(2) (1806) 8 East, 38.

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authority for the city of Leeds is the Lord Mayor, aldermen, and citizens of the city of Leeds acting by their council, and I so decide. It follows from what I have said that the Lord Mayor, aldermen, and citizens of the city of Leeds have power to acquire and hold the real estate described in the contract in question and to grant a lease thereof after the conveyance to themselves, and that the lands and hereditaments should now be conveyed to the corporation.

Solicitors: *Smiles & Co., for Clarke & Whittington, Leeds ;*
King, Wigg & Co., for R. E. Fox, Town Clerk, Leeds.

J. R. B.

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[1908 B. 645.]

Feb. 5, 6, 13. Friendly Society—Objects exhausted—Surplus or unexhausted Funds—Charity—Cyprès—Resulting Trust—Bona vacantia.

“The Benefit Society for Girls educated at the School of Industry, Kendal,” was established in 1808, and was registered as a friendly society under the Friendly Societies Act of 1793 (33 Geo. 3, c. 54), s. 2. It consisted of honorary members and benefited members. The honorary members were ladies who gave in their names when the society was formed or were afterwards elected according to the rules and paid a subscription. They could not in any case derive benefit from the funds of the society. The benefited members were girls educated at the School of Industry ; they paid weekly contributions to the society from the age of seven to sixty-five, and were entitled to certain weekly payments in sickness varying with age up to sixty-five, and to an annuity of 2s. a week from fifty-six to sixty-five, 2s. 6d. from sixty-five to seventy, and 4s. from seventy for the rest of their lives. All payments by the members and all sick allowances ceased at sixty-five. The annuities became payable automatically on a member attaining fifty-six without any inquiry as to poverty. The rules of the society provided that the contributions of honorary members should be appropriated, one half “to raise a capital the interest of which would be sufficient to pay the allowance to children under fifteen” ; the other half “to be under the special direction of honorary members for relief in extraordinary cases not provided by the general fund.”

The School of Industry was closed in 1845, and after that date no new members were admitted, but subscriptions continued to be received from both classes of members, sick allowances and annuities were paid, and

the balance of the funds accumulated. This action was brought by the trustees to decide what was to be done with the accumulations, which amounted to 1901*l.*, apportioned to the honorary members' fund and 304*l.*, apportioned to the benefited members' fund. The 1901*l.* appeared from the accounts to have arisen wholly from the first half of the honorary members' fund appropriated to provide for the allowances to children under fifteen. The only surviving benefited members were two women over sixty-five in receipt of annuities. Five persons who claimed to be honorary members were made defendants:—

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Held, that the society was not a charity, for the benefited members had a legal title to the benefits on making the payments without regard to their need; that the contributions of honorary members were absolute gifts to the society, and that there could be no resulting trust in favour of the honorary members; that the annuitants had no interest in the funds of the society other than the annuities which they had purchased; and that therefore the surplus of the benefited members' fund, after providing for the annuities, and the whole of the honorary members' fund belonged to the Crown as *bona vacantia*.

THIS action was brought by the trustees of a society called "The Benefit Society for Girls educated at the School of Industry, Kendal," to ascertain what should be done with the funds of the society, which had practically ceased to exist. The society was founded in 1808 and was registered as a friendly society under the Friendly Societies Act, 1793 (33 Geo. 3, c. 54). It consisted of honorary members and benefited members. The honorary members were ladies who when the society was formed gave in their names and subscribed 7*s.*, and ladies afterwards proposed and admitted according to the rules. The honorary members were liable to fines and forfeits for not attending meetings or refusing certain offices. No honorary member could ever receive relief from any of the funds of the society. As to the benefited members, all girls who at the time of the formation of the society were being, had been, or might thereafter be educated in the School of Industry at Kendal were eligible, and no others.

The School of Industry was an institution founded some time before with the object of providing for the girls of Kendal an education in such branches of female industry as would fit them to earn their living and to care for their own households. One hour a day was given to learning reading, writing, and arithmetic, and the rest of the time was spent in sewing and

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knitting; the work not required for the girls' own use was sold for their benefit. School fees were charged as a rule. The school was not considered a charity. Some of the girls could earn more than their school fees.

The rules of the society on which the arguments turned are set out below. (1)

(1) Rules:—

"1. Any lady giving in her name, and paying a subscription of seven shillings, will be an honorary member; and in future, any lady, desirous of becoming an honorary member, may be admitted at any quarterly meeting, on being proposed by an honorary member; but no lady, being an honorary member, can ever receive relief from any of the funds of the society."

"20. All the girls, who have been, are, or may hereafter be educated at the School of Industry, at seven years old, and upwards, are eligible to be admitted into this society."

"21. The payments in all cases shall commence from seven years old; those who have entrance money to pay, may do it by instalments; but no allowance in sickness will be made until all the arrears are paid, nor until six months after entrance."

"22. The following is the table of rates for payment:—

From the age of 7 to 16, one penny per week;

From the age of 16 to 65, two pence per week.

To be allowed in sickness from 7 to 14, when confined to bed, one shilling, and when well enough to walk about, but not to follow the accustomed avocation, six pence;

14 to 16, when confined to bed 2s., walking 1s.;

16 to 65, when confined to bed 4s., walking 2s.;

To allow an annuity from 56 to 65,

2s. per week; from 65 to 70,

2s. 6d. per week; from 70 for life,

4s. per week;

At 65 the weekly payments and the allowance in sickness are to cease."

"28. Payments from the general fund may continue full pay one year, if a person be really unable to work for so long; walking pay one year longer. Blindness, habitual lameness, or any such infirmity or disease as may continue through life without greatly shortening the period of it, cannot come within this description. In all cases of difficult decision, a physician must be consulted by the committee at the expense of the private fund."

"37. Immediately after the committee next following each quarterly meeting, the president shall pay to the treasurer all the money received above the sum required for current expenses, taking a receipt for the same, which money shall be invested as speedily as may be, in good security, upon interest."

"39. The subscriptions of honorary members, donations, with fines, and forfeits, after paying all the incidental expenses, as clerk's wages, books, &c., shall be appropriated one half to raise a capital, the interest of which will be sufficient to pay the allowance to the children under fifteen years; the remainder to raise a fund, to be under the special direction of the honorary members, for relief in extraordinary cases not provided by the general fund."

There was nothing in any of the rules expressly limiting the benefits of the society to poor persons. The age of every girl joining the society was entered in the books, and the secretary was required to enter her name as entitled to an annuity when she appeared from the books to have attained fifty-six without any inquiry as to her means.

The society was carried on in the manner provided by the rules down to the year 1845, when the School of Industry ceased to exist. After that date no new benefited members were, or indeed could be, admitted, and the society had been carried on for the benefit of the members enrolled before the abolition of the school. Subscriptions continued to be received from both classes of members, and the honorary members or the survivors of them continued to act as members of the committee, irrespective of the rules which required that some members of the committee should retire each year and that there should be an election, and new honorary members appeared to have joined the society without being properly elected. The funds of the society, after payment of annuities and sick pay to the benefited members, and of grants for relief in extraordinary cases out of the honorary members' fund, had been accumulated, and at the date of this action consisted of investments valued at 2205*l.* 8*s.* 6*d.*, apportioned as to 1901*l.* 1*s.* 2*d.* to the honorary members' fund and as to 304*l.* 7*s.* 4*d.* to the benefited members' fund. It appeared from the accounts that the whole of the 1901*l.* 1*s.* 2*d.* was to be attributed to and represented the first moiety of the honorary members' fund under rule 39, namely, the half which was to be appropriated "to raise a capital, the interest of which will be sufficient to pay the allowance to children under fifteen years." In the year 1878, the fund for children under fifteen years of age being no longer required, the balance, 903*l.* 10*s.*, was transferred to the same account as the second moiety under rule 39, which was entitled in the books of the society "The private fund at the disposal of honorary members." At the date of the transfer the private fund consisted only of about 188*l.*, which had been exhausted long before the commencement of the action. The rules did not authorize this transfer of the balance to "the private fund." So much of the interest

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of the 903*l.* 10*s.* as had not been applied in grants to members had been accumulated and now amounted to the said sum of 1901*l.* 1*s.* 2*d.* This fund arose entirely from donations, subscriptions, fines, and forfeits of honorary members. The 304*l.* 7*s.* 4*d.* balance of the benefited members' fund arose from the subscriptions or contributions of the benefited members. At the date of the action there were only two benefited members of the society surviving, namely, the defendants Elizabeth Armer, aged eighty-five, and Eleanor Jane Lowe, aged sixty-eight. Neither was liable to pay any further subscriptions. Elizabeth Armer was entitled to an annuity of 4*s.* a week for her life, and Eleanor Jane Lowe to an annuity of 2*s.* 6*d.* a week until she attained the age of seventy and thenceforward of 4*s.* a week.

Elizabeth Armer died between the date of the hearing and that of the delivery of judgment.

Sargant, for the Attorney-General. I do not make any claim to the fund contributed by benefited members; but the fund representing the contributions of honorary members was clearly contributed for charitable purposes. The case is different from cases where the purposes of the institution have wholly failed, and it is necessary to decide, as to the whole of its funds, whether there is a charity or a resulting trust, or the funds are bona vacantia. Here the two funds are kept wholly distinct; that contributed by voluntary members, who can take no benefit, is to be devoted, one part to securing the payment of the children's allowances, the other part for relief in extraordinary cases under the special direction of the honorary members. Both these are charitable objects. Thus the case is distinguished from *Cunnack v. Edwards* (1) and comes within Kekewich J.'s reasoning in *In re Buck*. (2) The fact that the society was registered as a friendly society does not prevent its being a charity: *Pease v. Pattinson* (3); *Spiller v. Maude*. (4) Those cases are not overruled by *Cunnack v. Edwards* (1), and in that case the question of funds contributed by honorary members

(1) [1895] 1 Ch. 489; [1896] 2 Ch. 679.

(2) [1896] 2 Ch. 727.

(3) (1886) 32 Ch. D. 154.

(4) (1881) 32 Ch. D. 158, n.

was not important, for there was only one. (1) It is plain from the whole scheme that the honorary members' fund was to be applied for the benefit of poor persons. Its distribution was at discretion and would be naturally left to a committee, who would not be doing their duty if they applied it for the benefit of persons who were not poor. A charity is not invalid because the beneficiaries are a fluctuating class not necessarily poor. Gifts to widows and orphans (*Attorney-General v. Comber* (2)), widows and orphans of seamen (*Powell v. Attorney-General* (3)), cottagers (*In re Christchurch Inclosure Act* (4)), domestic servants (*Reeve v. Attorney-General* (5)), have all been held good charitable gifts.

Hon. F. Russell, K.C., and P. F. Wheeler, for the surviving honorary members. There is no charity, for every member of the society was entitled to its benefits without any regard to her means. Sickness in itself is not an object of charity. In *In re Buck* (6) Kekewich J. came to the conclusion that poverty was a necessary ingredient in the qualification of the persons to benefit.

If there is not a charity there is a resulting trust for the honorary members, i.e., for the survivors and the representatives of those who are dead. The accumulations represent only the children's fund. That is set apart with a trust to apply the income in payments to the children. There is no trust as to the capital. It is a fund set apart for a particular object which has failed, and there is a resulting trust for the donor: see *In re Trusts of the Abbott Fund*. (7)

P. C. Vaughan, for the two annuitants. This is an ordinary benefit society, and the last surviving beneficiaries are entitled to the whole fund. There is no charity; the only ground for contending that there is one is the fact that part of the funds was raised by voluntary donations. That point was dealt with by Kekewich J. in *In re Buck* (8), and he decided that that fact alone could not make a society a charity. On the winding up of

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(1) As it appeared doubtful from the report whether there was only one honorary member, Swinfen Eady J. sent for the record and stated that it appeared there was only one.

(2) (1824) 2 S. & S. 93.

(3) (1817) 3 Mer. 48.

(4) [1894] 3 Ch. 209.

(5) (1843) 3 Hare, 191.

(6) [1896] 2 Ch. 727.

(7) [1900] 2 Ch. 326.

(8) [1896] 2 Ch. 733.

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a benefit society the whole of the funds belong to the existing members: *In re Printers and Transferrers' Amalgamated Trades Protection Society* (1); *In re Lead Company's Workmen's Fund Society*. (2) It may be said that the accumulations belong to the children's fund, in which the annuitants have no interest, but on the true construction of rule 39 only the income is appropriated to the children. In *In re Trusts of the Abbott Fund* (3) the subscriptions were made for a particular purpose during the lives of two ladies who were both dead. It was distinguished in *In re Andrew's Trust* (4), where some beneficiaries were living.

Sir S. T. Evans, S.-G., and *C. B. L. Tennyson*, for the Crown. This society was registered as a friendly society, and therefore it is not a charity: *In re Clark's Trust*. (5) There is nothing in the rules from which the Court can infer that poverty was in any way required as a qualification for membership.

Mr. Russell's clients cannot be entitled by way of resulting trust, for the accumulated fund represents the children's fund, and this fund was closed long before any of them joined the society. Moreover, they do not seem to have been elected as required by the rules, and they never paid 7s. subscription. The rule requiring this was altered by resolution on January 10, 1879, but that alteration was never registered, and so is invalid: see *Friendly Societies Act, 1875* (38 & 39 Vict. c. 60), ss. 5 and 6, and the *Friendly Societies Act, 1793* (33 Geo. 3, c. 54), s. 3. These defendants are, therefore, not honorary members at all; and if they were, s. 14 of the last-named Act makes their contributions the absolute property of the society and precludes any resulting trust. (6)

As to the annuitants, it is very doubtful whether they have not ceased to be members of the society. They have ceased to make

(1) [1899] 2 Ch. 184.

(2) [1904] 2 Ch. 196.

(3) [1900] 2 Ch. 326.

(4) [1905] 2 Ch. 48.

(5) (1875) 1 Ch. D. 497.

(6) Sect. 14 enacts: "It shall and may be lawful for any such society to receive donations of any person or persons, towards the supply

of their stock or fund, and all such sums shall be applicable to the general purposes of such society, in the like manner as the contributions of the several members of such society are or shall be directed to be applied in pursuance of this Act, and shall not be applied in any other manner."

contributions and to be entitled to any benefits except their annuities. In the cases quoted the societies were being wound up by resolution and the members were held to be entitled in proportion to their contributions. These annuitants have contributed nothing to the children's fund represented by these accumulations and cannot have any claim on it.

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Feb. 13. SWINFEN EADY J. This action is brought to determine the question what ought to be done with certain funds vested in the plaintiffs, Isaac Braithwaite and John Jowitt Wilson, as trustees acting for a society which has now ceased to exist and was known as "The Benefit Society for Girls educated at the School of Industry, Kendal."

This society was established in the year 1808 and was duly registered as a friendly society at quarter sessions pursuant to the statute 33 Geo. 3, c. 54, s. 2. [His Lordship then stated the facts of the case and the effect of the rules as above, and continued :—] The rules did not authorize the children's fund being carried over to the credit of "the private fund," and, although no question is now raised with regard to any sums already paid away, the balance remaining must be treated as if still appropriated in the manner provided by the rules. This fund arises entirely from donations, subscriptions, fines, and forfeits of honorary members' and not any portion of it has been contributed by benefited members. The 30*l.* 7*s.* 4*d.* balance of the benefited members fund has been subscribed or contributed by the benefited members. [His Lordship then stated the ages of the defendants Elizabeth Armer and E. J. Lowe and the annuities to which they were entitled at the date of the hearing, and continued :—] It is not disputed that the benefited members' fund is liable in the first instance to be applied in satisfying these annuities. The question is, What is to become of the residue of the benefited members' fund and the whole of the 1901*l.* 1*s.* 2*d.* ?

The Attorney-General did not put forward any claim on behalf of charity to the surplus of the benefited members' fund, but with regard to the 1901*l.*, which for the sake of brevity I will call "the children's fund," he contended that it was the subject of a charitable trust and ought now to be applied *cypres*. I am of

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opinion that this friendly society was not a charitable institution. The society was one whose members were to provide by subscriptions and fines a fund to be distributed for their mutual benefit in cases of sickness and old age. Poverty of the member at the time of sickness or old age was not required to entitle her to the benefits of the institution. She acquired a legal right to these benefits by reason of her membership and paying her dues under the rules. It cannot be contended that a wealthy member would not be entitled to her annuity equally with a poor one. The funds of the society were augmented by the contributions of honorary members, which formed "the children's fund," but the funds of the society were not clothed with any charitable trust, and their character was not wholly, or to the extent of the addition, varied by such addition: see *In re Clark's Trust*(1); *Cunnack v. Edwards*. (2) The case of *In re Buck* (3) referred to a society where only members in distressed circumstances arising from poverty were eligible for relief, and it was held that poverty in itself was an object of charity. I therefore determine that the Attorney-General is not entitled to have the funds applied in charity cypres.

It was next contended on behalf of the honorary members that they were entitled to "the children's fund" on the ground that, as the society had now come to an end, there was a resulting trust in their favour as subscribers to the fund. I am not satisfied that the defendants, who are sued as honorary members, really fill that position. They do not appear to have been duly elected or admitted pursuant to the rules. They did not become subscribers until long after the closing of the children's fund, and have only paid 1s. a year. On January 10, 1879, a resolution purported to be passed at a quarterly and committee meeting as follows: "It is decided that a subscription of 1s. per annum shall be sufficient from the honorary members." This alteration of the rules has not been registered in manner required by the Friendly Societies Act, 1875, and by s. 13, sub-s. 2, of that Act no amendment of a rule is valid until registered, and s. 6 of the same Act applies the provisions of that Act to existing registered societies.

(1) 1 Ch. D. 497.

(2) [1895] 1 Ch. 489; [1896] 2 Ch. 679.

(3) [1896] 2 Ch. 727.

But there is a further answer to the claim of the honorary members. Under s. 14 of the Act 33 Geo. 3, c. 54, societies may receive donations from any person or persons. Sums so given become the absolute property of the society. The donors have parted, once for all, with all interest in the sums so given, and there is no resulting trust in their favour.

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It was next contended that the two remaining benefited members of the society were entitled to the whole funds now remaining; but their only right is under their contract of membership, pursuant to which they are entitled to certain annuities out of the benefited members' funds, but not to the surplus of those funds, after satisfying their annuities, nor to "the children's fund." In *In re Lead Company's Workmen's Fund Society* (1) there were at the date of the winding-up 439 members, of whom eighty-eight had attained sixty-five years of age, and accordingly ceased to contribute, and had become entitled to a pension of 6s. a week for life; the invested funds of the society consisted only of some 32,000*l.* Consols, and it was admitted that, with no new members coming in, the society was insolvent, and that if it continued to pay the 6s. a week pension to the members who had attained sixty-five out of its capital, and also to make the usual sick pay allowances, the younger members of the society would probably receive nothing. Again, in *In re Printers and Transferrers' Amalgamated Trades Protection Society* (2), when the trade union was dissolved there were 201 members who had contributed to the funds, which then amounted to only about 1000*l.*, and the Attorney-General made no claim to the funds as bona vacantia.

In neither of these cases was there any question as to the persons entitled to any surplus after providing for the claims of members under the rules. In neither case was there in fact any surplus whatever. Two cases have, however, been decided where the sole surviving member of a friendly society, or the legal personal representative of the last deceased member, claimed the remaining funds of the society. In *Spiller v. Maude* (3) the plaintiff was the sole surviving member of the York Theatrical

(1) [1904] 2 Ch. 196.

(2) [1899] 2 Ch. 184.

(3) 32 Ch. D. 158, n.; (1864) 10

Jur. (N.S.) 1089.

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Fund Society, which was a society duly enrolled under the Friendly Societies Act 10 Geo. 4, c. 56. She was entitled under the rules to the whole income of the trust fund, which then amounted to about 1300*l.* New Three per cent. Annuities. She, however, claimed to be absolutely entitled to the principal of the fund as the sole surviving member of the society. Sir John Romilly M.R. did not accede to this view, but directed the funds to be paid into Court and the income only paid to the plaintiff for life. The same claim was advanced again on the plaintiff's death, when her legal personal representative claimed to be entitled to so much of the fund as had been subscribed by members of the society, and the claim was again rejected by Sir George Jessel M.R.

Again, in *Cunnack v. Edwards* (1) the legal personal representative of the last surviving member claimed to be entitled to the unexpended funds of the society, amounting to 1250*l.*, and by amendment one Clarke was added to represent the representatives of deceased ordinary members as a body. Chitty J. pointed out that the society was not a tontine society and held that there was no ground for saying that the funds belonged in equity to the last survivor; and the Court of Appeal decided that there was not any resulting trust in favour of deceased ordinary members as a body.

In the present case the two surviving benefited members are entitled to the annuities for which their contract of membership provides, but not to any other interest in the funds.

The entire beneficial interest has been exhausted in respect of each deceased benefited member, and when the annuities to the two surviving members cease to be payable upon their respective deaths, they too will have exhausted all their beneficial interest in the funds.

All possible claimants to the fund having now been disposed of, I decide that the surplus of the benefited members' fund and the children's fund belong to the Crown as *bona vacantia*.

Solicitors: *Kinch & Richardson, for C. G. Thomson & Wilson, Kendal; Treasury Solicitor.*

(1) [1895] 1 Ch. 489; [1896] 2 Ch. 679.

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[00382 of 1908.]

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*Company — Winding-up — Surplus Assets — Accumulated Profits — Capital —
Arrears of Preferential Dividends — Direction to pay out of Surplus
Assets — No Dividends declared — To what extent Arrears payable.*

*Not followed. In
re WHARFEDALE
BREWERY CO. LD.
[1952] 1 Ch. 913*

A company's capital consisted of 5 per cent. cumulative preference shares and ordinary shares, the preference shares having priority both as to capital and dividend, and the preferential dividend being payable before any profits could be carried to reserve.

The articles provided that no dividend should be payable except out of profits, and that, in the event of the company being wound up, the surplus divisible assets for the time being remaining "after paying the liabilities of the company" should be applied first in repaying the preference capital and "secondly in paying the arrears (if any) of the five per cent. preferential dividends thereon to the commencement of the winding-up." The remainder of the surplus assets was to belong to the ordinary shareholders.

No dividends were ever declared, but the profits were accumulated until the company was wound up :—

Held, that the preference shareholders were entitled to their arrears of preferential dividends, though not declared, but only to the extent of the accumulated profits.

In re Crichton's Oil Co., [1901] 2 Ch. 184; [1902] 2 Ch. 86, distinguished.

ORIGINATING SUMMONS.

The above company was incorporated on May 20, 1899. The memorandum of association stated the capital as follows :

Clause 5. "The capital of the company is 10,000*l.*, divided into 500 preference shares of 10*l.* each and 500 ordinary shares of 10*l.* each, and such preference shares shall confer the right to a fixed cumulative preferential dividend at the rate of five per cent. per annum on the capital paid up thereon, and shall rank, both as regards dividends and capital, in priority to the ordinary shares ; and upon any increase of capital the company is to be at liberty to issue any new shares with any preferential, deferred, qualified, or special rights, privileges, or conditions attached thereto."

Of this capital 315 preference shares of the nominal value of

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3150*l.* and 256 ordinary shares of the nominal value of 2560*l.* were issued and paid up.

The articles provided as follows :

Article 5. "The capital of the company shall, subject as herein after authorized, consist of 10,000*l.*, divided into 500 five per cent. cumulative preference shares of 10*l.* each and 500 ordinary shares of 10*l.* each ; and the registered holders of shares in the company for the time being, whatever the number issued, shall have such rights and privileges attaching to such shares as follows :—

"(a) Preference shares shall be entitled to be paid out of the net profits of the company cumulative preferential dividends at the rate of five per cent. per annum, and shall have priority over all the other share capital for the time being of the company, both as to capital and dividend.

"(b) Of the surplus net profits of the company in each year which may remain after payment of the dividends provided for by the foregoing sub-clause, such a sum (if any) as the directors may see fit shall be carried to a reserve fund, pursuant to article 109 hereof, and the remainder shall belong to and be distributed amongst the holders of ordinary shares.

"(c) All net profits divisible amongst the holders of the several classes of shares under the foregoing sub-clauses shall be divided amongst the respective holders of each such class of shares pro rata, according to the number of shares held and the amounts paid up thereon respectively.

"(d) In the event of the company being wound up, or of its capital, assets, or any part thereof becoming from any cause distributable among the members of the company, the surplus divisible assets for the time being remaining after paying the liabilities of the company shall be applied, first, in repaying the capital paid up on the said 500 preference shares or so many thereof as may be issued for the time being, and, secondly, in paying the arrears (if any) of the five per cent. preferential dividends thereon to the commencement of the winding-up or the date of such distribution, as the case may be. The remainder of such surplus assets, after making the payment aforesaid to the holders of the preference shares, shall belong to the holders of

the ordinary shares in proportion to the amounts paid up on the shares held by them respectively."

Article 107. "The profits of the company made during the financial year or other period comprised in the accounts submitted to the ordinary general meeting in each year shall be applicable in order of priority and manner following:—First, to the payment of a cumulative preferential dividend at the rate of five per cent. per annum on the capital paid up on the preference shares to the close of such period; secondly, of the surplus, such part as the directors may determine may be carried to the reserve fund to be established pursuant to article 109 hereof; and thirdly, the residue shall be divisible amongst the holders of ordinary shares in proportion to the amount paid up on the shares held by them respectively. Provided that where capital is paid up in advance of calls upon the footing that the same shall carry interest, such capital shall not, whilst carrying interest, confer a right to participate in the profits."

Article 108. "The company in general meeting may declare a dividend to be paid to the members according to their rights and interests in the profits, and may fix the time for payment. No dividend shall be payable except out of the profits of the company. The directors may in their discretion from time to time declare and pay to the members such interim dividends as in their judgment the position of the company justifies."

Article 109. "The directors may, with the sanction of a general meeting, before recommending any dividend on the ordinary shares, set aside, out of the profits of the company remaining after payment of all dividends due on the preference shares, such sum as they may think proper as a reserve fund, to meet contingencies, or for equalizing dividends, or for repairing or maintaining any buildings or works connected with the business of the company, or to cover the loss in wear and tear or other depreciation or diminution in value of any property which shall belong to or from time to time be acquired by the company, and the directors may invest the sum so set aside as a reserve fund upon such securities as they may from time to time approve of."

No dividends were ever declared on either class of shares, but

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the profits were accumulated, and on March 28, 1908, the date of the last balance-sheet, amounted to 605*l*.

By special resolutions of August 7 and August 31, 1908, the company was wound up voluntarily and a liquidator appointed.

After payment of debts the liquidator had 4767*l*. in hand for the preference and ordinary shareholders, subject to costs. The preference capital would absorb 3150*l*., leaving a balance of 1617*l*.

The question was whether the preference shareholders could claim this balance to the extent of 1457*l*., being the arrears of their preferential dividends calculated at 5 per cent. interest on their capital to the commencement of the winding-up, or only to the extent of the 605*l*. accumulated profits, or whether the whole balance belonged to the ordinary shareholders.

The liquidator issued this summons to determine the point.

Cyprian Bridge, for the liquidator.

Reginald Symes, for the preference shareholders. The preference shareholders are entitled to the 1457*l*. arrears of preferential dividends before anything is paid to the ordinary shareholders. Article 5 (*d*) obviously directs the arrears of preferential dividends to be paid whether declared or not. A declared dividend, though postponed to the claims of outside creditors by the Companies Act, 1862 (25 & 26 Vict. c. 89), s. 38, sub-s. 7, is a debt or liability of the company payable out of the assets before anything is divisible among the members as such. A direction to pay arrears of declared dividends is therefore superfluous, and the article must refer to preferential dividends whether declared or not: *Palmer's Company Precedents*, 9th ed., pt. 1, p. 683.

[SWINFEN EADY J. You are only entitled to dividends out of profits: articles 5 (*a*), (*b*), (*c*) and 108. You are really claiming interest in excess of profits.]

Article 5 (*a*), (*b*), (*c*) and article 108 only apply to the company as a going concern. Article 5 (*d*) is an independent provision as to the distribution of the surplus assets on winding up. The preferential dividends are actually in arrear to the extent of 1457*l*. owing, no doubt, to the fact that the profits were insufficient to pay them. The article directs these arrears to be

paid out of the assets, and not merely out of the accumulated profits.

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Henry Johnston, for the ordinary shareholders. The preference shareholders are only entitled to their capital. While the company was a going concern they were only entitled to preferential dividends declared out of net profits. None were declared, so there are no arrears. No dividend can now be declared out of the 605*l.* undistributed profit: *In re Crichton's Oil Co.* (1) The only question is whether article 5 (*d*) makes any difference. Now articles 5 (*a*), (*b*), (*c*) and 108 define the rights of the shareholders. Article 5 (*d*) is merely declaratory. It does not enlarge the rights of any class, but merely states for the liquidator's guidance the order in which the surplus assets are to be applied in a winding-up. After paying the liabilities, i.e., the debts, not the nominal liabilities to capital profit and loss or dividends payable thereout, the assets are to be applied in repaying preference capital and arrears of preferential dividends, i.e., dividends actually declared, and the surplus is to be paid to the ordinary shareholders. If the word "liabilities" included declared dividends it would include dividends declared on the ordinary shares, and they would be paid in priority to the preference capital. That cannot have been the draftsman's intention. There is, therefore, no redundancy in article 5 (*d*), nor any ground for inserting the words "whether declared or not" after the direction to pay the arrears of the preferential dividends. In any case the preference shareholders cannot claim arrears of dividend beyond the amount of the 605*l.* accumulated profits.

Reginald Symes, in reply. *In re Crichton's Oil Co.* (1) is distinguishable. In that case the preferential dividend was only payable out of profits available for dividends, the directors having power to first set aside a reserve. Here the preferential dividends are payable before any profits can be carried to reserve. Again, there was no direction in that case to pay the arrears out of the surplus assets, as in article 5 (*d*) hereof. If the preference shareholders are not entitled to their full arrears out of the assets, they are at all events entitled to them to the extent of the 605*l.* accumulated profits.

(1) [1901] 2 Ch. 184; [1902] 2 Ch. 86.

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SWINFEN EADY J. This is a summons by the liquidator raising the question how the surplus assets are to be dealt with after satisfying the liabilities. It appears that after payment of debts the liquidator has 4767*l.* in hand. The preference capital is 3150*l.*, the ordinary 2560*l.*, and there is a sum of 605*l.* to the credit of profit and loss. The preference shareholders did not receive their 5 per cent. dividends while the company was a going concern. In fact no dividend was ever declared.

In these circumstances the question is what are the respective rights of the preference and ordinary shareholders? Those rights depend on the true construction of the memorandum and articles of association. [His Lordship referred to clause 5 of the memorandum and to articles 5, 107, and 108.] The provision in article 108 that "no dividend shall be payable except out of the profits of the company" is merely a statement of the ordinary law. The preference shareholders contend that they are entitled to a sum equivalent to 5 per cent. interest on their preference capital from the time it was paid up, and that that sum ought to be paid immediately after their preference capital. Now article 5 (*d*) is in a form quite different from that in any previous case.

In *In re Crichton's Oil Co.* (1), article 6 (*b*) provided that in the event of the winding up of the company the surplus assets "shall be distributed between the holders of preference shares and ordinary shares, according to the amount paid up thereon." In the present case the provision is quite different. Article (5) (*d*) provides that "in the event of the company being wound up . . . the surplus divisible assets for the time being remaining after paying the liabilities of the company shall be applied, first, in repaying the capital paid up on the said 500 preference shares or so many thereof as may be issued for the time being"—here 315 shares, fully paid—"and, secondly, in paying the arrears (if any) of the five per cent. preferential dividends thereon to the commencement of the winding-up. . . . The remainder of such surplus assets, after making the payment aforesaid to the holders of the preference shares, shall belong to the holders of the ordinary shares in proportion to the amounts paid up on the shares held by them respectively." Now it is to be observed

(1) [1901] 2 Ch. 184; [1902] 2 Ch. 86.

that it is "arrears of dividends" that are to be paid, and by article 108 dividends are only payable out of net profits. There is nothing in the articles to give the preference shareholders any claim to interest on their capital in case there are no profits. In these circumstances I determine that the preference shareholders cannot sustain their claim to 5 per cent. interest on their capital in priority to the ordinary shareholders' right to return of their capital. I prefer to call it a claim to interest rather than dividend, as dividend is only payable out of profits.

On the other hand the ordinary shareholders contend that the preference shareholders are only entitled to arrears of dividends actually declared, and that, none being declared, there are no arrears. That contention cannot be sustained. Article 5 (*d*) is in a special form and is intended to secure the rights of the preference shareholders to arrears of dividends, whether declared or not, so long as there are net profits available. This is shewn by the language of the article. The liabilities are first to be paid. Although a liability to a shareholder for a dividend declared is not deemed to be a debt of the company payable to the shareholder in competition with outside creditors (Companies Act, 1862, s. 38, sub-s. 7), it is nevertheless a liability of the company, and therefore payable under article 5 (*d*) before the surplus assets are ascertained. The article then deals with the surplus assets after paying that and other liabilities. The language is very strong. It provides that the surplus assets shall be applied, first, in repaying the preference capital, and, secondly, "in paying the arrears (if any) of the five per cent. preferential dividends thereon to the commencement of the winding-up." The language is not limited to dividends declared while the company is a going concern. The arrears are to be paid to the commencement of the winding-up. It is inconceivable that the preference shareholders' right to these is to depend on the directors holding a meeting in contemplation of the winding-up and declaring a dividend to that date. Reading the memorandum and articles together, I hold that the preference shareholders are entitled to the arrears of their 5 per cent. dividends, whether declared or not, but so far only as profits are now available.

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The surplus assets must therefore be applied, first, in repaying the 3150*l.* preference capital, and, secondly, in paying arrears of preferential dividend to the extent of the 605*l.* profits available. The surplus will go to the ordinary shareholders. The costs will come out of the assets.

Solicitors: *Andrew, Wood, Purves & Sutton, for William Johnston, Stockport.*

G. R. A.

NEVILLE J. *In re* AN ARBITRATION BETWEEN HARVEY AND LONDON
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Jan. 13, 14. Housing of the Working Classes—Local Authority—Improvement Scheme—Compulsory Powers—Lands injuriously affected—Business Premises—Easement of Light—Compensation—Evidence of Loss of Trade, Admissibility of—Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), ss. 20, 21, 22, 93; Sched. II., cls. 4, 7, 11.

Where land is injuriously affected by the carrying into effect of an improvement scheme under the provisions of the Housing of the Working Classes Act, 1890, such as the extinguishment under s. 22 of the Act of an easement appurtenant to premises adjoining but not included in the scheme, the arbitrator, in determining the compensation to be paid to the owner of the easement for the loss sustained by him by reason of the operation of the Act, cannot take into consideration the loss of trade or diminution in value of the goodwill of the business carried on at the premises enjoying the easement.

SPECIAL CASE.

By a provisional order made in May, 1900, under the provisions of Part I. of the Housing of the Working Classes Act, 1890, and confirmed by a special Act of Parliament, the London County Council were authorized to carry into effect a scheme for the improvement of certain unhealthy areas in Clerkenwell and Holborn. The scheme provided (*inter alia*):—

“4. The lands constituting the said improvement areas or any of them may for the purposes of this scheme be taken compulsorily.

“5. The existing buildings upon the lands constituting the improvement areas shall be taken down and removed and new

dwellings upon the said lands shall be erected as may be determined from time to time in that behalf by the council with the approval of one of Her Majesty's principal Secretaries of State. NEVILLE J.

"The new dwellings shall be constructed in such manner as to position elevation size design and extent of accommodation as the council with such approval as aforesaid shall prescribe or approve"

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For the purposes of their scheme the council acquired compulsorily a row of buildings in Leather Lane, Holborn, which they pulled down, and on the site thereof erected new dwellings of greater height than the old buildings. One end of these new buildings abutted on No. 49, Leather Lane, which was not included in the improvement area, and was in the occupation of Jane Harvey on a yearly tenancy, and she was then, and for many years prior thereto had been, carrying on there the business of a butcher. No. 49, Leather Lane had ancient lights on its rear and on the side facing the new buildings, and these lights were interfered with by the new buildings.

On February 20, 1907, Jane Harvey (hereafter called "the claimant") served on the council a written notice which, omitting formal parts, was as follows:—

"Whereas by the exercise of the powers contained in the Housing of the Working Classes Act, 1890, and the Acts incorporated therewith and the London (Clerkenwell and Holborn) Provisional Order Confirmation Act, 1900, you have taken part of a certain house and shop situate and being No. 49 Leather Lane in the city of London and an easement appurtenant thereto and have injuriously affected such house and shop. Now I the undersigned Jane Harvey of No. 49 Leather Lane aforesaid widow being possessed of the said house and premises as a yearly tenant do hereby in pursuance of the statutes in that case made and provided give you the said council notice that I require you to pay me compensation in respect of the part of the said house and shop and the said easement and my estate and interest therein and for the damage which has been and will be sustained by me by reason of the execution of the works authorized by the said Acts and

NEVILLE J. that the amount of my claim for compensation is 1350*l.* And
1909 I further give you notice that unless you are willing to pay the
HARVEY amount of such compensation and enter into a written agree-
AND ment for that purpose within twenty-one days after the receipt
LONDON by you of this notice then I desire that the amount may be
COUNTY settled by arbitration according to the provisions contained in
COUNCIL, the said statutes in such case made and provided.”
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On May 17, 1907, the council served on the claimant a counter-notice whereby, after reciting her notice of February 20, 1907, they formally offered her “the sum of 25*l.* as compensation in respect of all damage sustained or to be sustained by you to which you may be entitled by law.” The claimant declined this offer, and the matter went before the arbitrator appointed to deal with all cases of disputed claims under the scheme.

The special case, after embodying the above facts, proceeded as follows :—

“9. At the first hearing before me as such arbitrator as aforesaid on July 11, 1907, at which the claimant and the council were both represented by counsel, it was admitted by the council that there was at the back of the claimant's premises an easement of light and air over a part of the area acquired by the council appurtenant thereto which had been partially taken or interfered with by the council in carrying out the said scheme, and that the council was bound to pay some compensation in respect thereof. The claimant called expert evidence to shew that the lettable value of the buildings for any trade or other purpose including the particular trade carried on by her was depreciated, and also tendered evidence to shew what was prior to the year 1906 the average annual profit in her business, with a view of establishing that her trade had been affected by the acts of the council, and the goodwill thereof. The council objected to the evidence so tendered on the ground that I had no jurisdiction under the Housing of the Working Classes Act, 1890, to award compensation for such personal loss or injury (if any) arising from the interference with the said easement, as the provisions in that behalf of the Lands Clauses Consolidation Act, 1845, were expressly excluded by s. 20 of the said Act

of 1890, and that the said Act of 1890 contained no like pro- NEVILLE J.
vision. I upheld the objection as I thought that the contention
of the council was well founded. At the request of the claimant,
however, I stated this case for the opinion of the Court.

"10. The claimant died on January 16, 1908, intestate, and
on February 12, 1908, letters of administration to her personal
estate and effects were granted to Esther Jessie Moody.

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"The question for the opinion of the Court is :—

"Whether the evidence tendered by the claimant was
admissible in the said arbitration, and whether, in determining
the compensation to be paid by the council to the claimant for any
loss sustained by reason of the provisions of the Housing of the
Working Classes Act, 1890, owing to the partial extinguishment
of or interference with the easement of light and air relating to
the lands required for the purposes of carrying into effect the
scheme, I could as arbitrator take into consideration the loss of
trade and diminution in value of goodwill."

Beddall, for the administratrix. The definition of "land" in
s. 93 of the Act includes an easement, and by s. 22 of the Act
compensation is to be paid for any easement "in or relating to"
any lands acquired by the local authority for the purposes of
their scheme, and the compensation to be paid is to be deter-
mined "in the manner in which compensation for lands is
determinable" under the Act, that is, by arbitration. It is
submitted that s. 21 does not apply to the acquisition of an
easement, and that compensation under s. 22 and clause 4 in
Sched. II. for lands injuriously affected is not restricted by the
provisions in s. 21.

[NEVILLE J. I think the words in s. 22 refer to s. 21 and
mean that "the fair market value" of the easement extinguished
is to be ascertained and paid.]

Then, taking ss. 21 and 22 together, you cannot estimate the
market value of an easement apart from the property to which
it is attached, and its special value to the owner of that property
and the compensation must include the special value attaching
to the land by reason of the goodwill of the business carried on
there: *Cripps on Compensation*, 5th ed. p. 107; *Badham v.*

NEVILLE J. *Marris* (1); *Barlow v. Ross* (2); *White v. H.M. Commissioners* 1909
 HARVEY of Works (3); *Ricket v. Metropolitan Ry. Co.* (4); *Metropolitan*
 AND Board of Works v. *McCarthy*. (5) Further, although s. 68
 LONDON of the Lands Clauses Consolidation Act, 1845, is excluded by
 COUNTY s. 20 of the Act of 1890, clauses 4 and 7 of Sched. II. of the Act
 COUNCIL, of 1890 obviously contemplate compensation being given for lands
 In re, injuriously affected. Taking an easement is taking part of a

house: *Duke of Buccleuch v. Metropolitan Board of Works*. (6)
 This easement of light may be treated as part of the house and
 it was essential to the business carried on there, and in esti-
 mating the market value of the easement evidence is admissible to
 shew reduction in trade arising from the extinguishment of the
 easement. The analogy of the decisions on the law of rating
 applies to this case: *London County Council v. Erith Overseers*. (7)

Jenkins, K.C., and *Courthope-Munroe*, for the London County
 Council. We have not taken her land. We have only interfered
 with an easement. That is a legal right, and the compensation
 for the damage sustained for its loss is the difference between the
 value of the premises with the easement and the value of the
 premises without the easement, and nothing can be allowed for
 depreciation (if any) in the value of the goodwill of the business
 which is more a personal injury: *Clark v. London School*
Board (8); *Reg. v. Metropolitan Board of Works* (9); *Wigram v.*
Fryer. (10) Sect. 68 of the Lands Clauses Consolidation Act,
 1845, deals with compensation for loss sustained by land or any
 interest in land injuriously affected, and the extent to which the
 decisions have gone under that section is shewn by *In re Wadham*
and North Eastern Ry. Co. (11), where compensation was allowed
 for depreciation in the special value of a public-house. But the
 principle of that decision does not apply here, because s. 68 is
 excluded by s. 20 of the Act of 1890. We have only to pay for
 the fair market value of the easement, and that does not include

(1) (1881) 45 L. T. 579.

(2) (1890) 24 Q. B. D. 381, 393.

(3) (1870) 22 L. T. 591.

(4) (1867) L. R. 2 H. L. 175.

(5) (1874) L. R. 7 H. L. 243.

(6) (1872) L. R. 5 H. L. 418.

(7) [1893] A. C. 562.

(8) (1874) L. R. 9 Ch. 120.

(9) (1869) L. R. 4 Q. B. 358.

(10) (1887) 36 Ch. D. 87.

(11) (1884) 14 Q. B. D. 747; affirmed
 on appeal, (1885) 16 Q. B. D. 227.

the loss of trade nor the goodwill of the business: *Gough v. NEVILLE J. Liverpool Corporation*. (1)

Beddall, in reply.

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 —

NEVILLE J. The question in the present case is whether evidence is admissible to shew that the trade of the plaintiff has been affected by the extinguishment of an easement of light under s. 22 of the Housing of the Working Classes Act, 1890, with a view to obtaining compensation therefor. Looking at the provisions of the Act itself, I see nothing that gives compensation for loss of trade. There are certain clauses in the Lands Clauses Consolidation Act which indicate that in the case of a compulsory purchase of lands compensation may be awarded either directly or indirectly in respect of loss of trade and goodwill, but they do not apply to the case before me. It seems to me that, taking ss. 21 and 22 of the Act together with clause 4 of the Second Schedule, the compensation under s. 22 is compensation, not for lands compulsorily taken, but for lands injuriously affected; and whatever may be the rights of persons in the case of lands compulsorily taken under this Act, as to which I say nothing, I see nothing in the Act itself, or in the decisions on the Lands Clauses Consolidation Act, to indicate that under s. 22 of the Act of 1890 compensation can be awarded for loss of profit or goodwill in a trade or business. Then it is said that the evidence which was rejected should have been admitted on the question of the value of the house, which has to be determined, no doubt, in order to ascertain what depreciation in that value has been occasioned by extinguishing the easement. Now it is to be observed from the case stated by the arbitrator that the evidence was not tendered on that point at all, but on a totally different point. But, even supposing one gives the go-by to that objection, I am satisfied that evidence as to the actual trade done on the premises would not be relevant on the question of what the value of the premises was, having regard to the kind of trade which might be carried on there. I must state, therefore, in answer to the question raised by the case, that in the opinion of this Court the

(1) (1891) 65 L. T. 512.

NEVILLE J. evidence tendered by the claimant was not admissible in the said arbitration, and that in determining the compensation to be paid by the council to the claimant for any loss sustained by reason of the provisions of the Housing of the Working Classes Act, 1890, owing to the partial extinguishment of or interference with the easement of light and air relating to the lands required for the purposes of carrying into effect the scheme, the arbitrator cannot take into consideration the loss of trade or diminution in the value of the goodwill. The case must go back to the arbitrator with this expression of my opinion.

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HARVEY
AND
LONDON
COUNTY
COUNCIL.
In re.

Solicitors: *E. Cave & Co.; E. Tanner.*

H. L. F.

NEVILLE J.

In re STAWELL'S TRUSTS.

POOLE *v.* RIVERSDALE.

1909
Jan. 12, 13,
23.

[1908 S. 2251.]

Settlement—"Eldest Son"—Portions for Younger Children vesting at twenty-one—Period of Distribution postponed—Accelerating Period of Distribution—Mortgage by Younger Son—Younger Son afterwards becoming Eldest Son.

A testator by his will settled real estates on his daughter for life with remainder to her first and every other son successively in tail male, with remainders over, and with power for her on her marriage by deed to limit a life estate to her husband and to charge 6000*l.* on the estates as portions for her younger children to be payable "at such times or time and in such manner" as she should by deed appoint. In 1845 she married, and by her marriage settlement a life estate was given to the husband and a term of years was limited upon trusts, in the events which happened, after the death of the husband and wife to raise the portions to vest in and be payable to younger sons at twenty-one and daughters at that age or marriage, but payment to be postponed until the deaths of the husband and wife unless the husband should signify in writing that the same should be sooner paid. There were three children, two sons and a daughter, all of whom attained twenty-one before 1882, when the mother died. In 1897 W., the younger son, mortgaged his portion (3000*l.*), the father joining in the mortgage deed to signify that the same should be raisable immediately. In 1900 W., on the death of his elder brother without issue, became the eldest son, and in 1905, on the death of the father, succeeded to the estates as tenant in tail, and afterwards died without issue. The question then

arose whether W.'s estate was entitled to have the 3000*l.* raised and paid :— NEVILLE J.

Held, that the wife had power to authorize her husband to accelerate the time for payment of the portions, and that it was competent for the husband to signify by the mortgage of 1897 that W.'s then portion should be immediately raisable; that that deed was equivalent to payment of the portion; and that W.'s legal personal representative was entitled to have the 3000*l.* raised and paid notwithstanding that W. had afterwards become the eldest son.

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TRUSTS,
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ADJOURNED SUMMONS.

Jonas Stawell died in January, 1835, having by his will devised real estates in Ireland to trustees and their heirs (subject to certain annuities that afterwards determined) to the use of his daughter Charlotte Stawell and her assigns for her life with remainder to her first and every other son successively in tail male, with remainders over, and the testator empowered his said daughter by deed to be made on the occasion of her marriage to charge the said estates with any sum not less than 6000*l.* as and for portions for the younger children to be born of such marriage, such sum to be secured on the said estates by all such ways as were usual in family settlements and most effectual for the purpose; and the testator empowered his trustees with the consent of his daughter Charlotte to limit the said estates by such marriage settlement to his daughter Charlotte and her husband (such husband taking and using the name of Stawell) for the joint lives of herself and her said husband and the life of the survivor of them, and as to the sum of 6000*l.* to be made a charge upon his said estates by such marriage settlement, by way of provision for such younger children as aforesaid, the testator directed that the same should be made payable in and by such marriage settlement to and amongst the younger children or younger child (if but one such) of his said daughter Charlotte and such husband as aforesaid in such shares and proportions and at such times or time and in such manner and form as the said Charlotte Stawell should by deed or by will or codicil notwithstanding her coverture direct or appoint, "and in default of such direction or appointment then the same to be equally divided share and share alike amongst such younger children to become vested interests in the sons upon their

NEVILLE J. attaining the age of twenty-one years and in the daughters on their
1909 attaining that age or day or days of marriage, whichever shall
STAWELL'S first happen, but in case any of such younger children shall die
TRUSTS, before the time or times of attaining such age or if daughters
In re. before such age or day or days of marriage then the portion or
POOLE portions of such child or children so dying to be equally divided
v.
RIVERSDALE. amongst the survivors."

In 1845 Charlotte Stawell married William St. Leger Alcock (who then assumed the surname of Stawell and is hereafter called William Alcock Stawell), and by her marriage settlement and in pursuance of the said power in the will of Jonas Stawell the said estates were limited to trustees for a term of 1000 years to the use of William Alcock Stawell for his life and, subject thereto, upon trust (inter alia) that, in case there should be any children of the said marriage other than an eldest or only son for the time being entitled under the limitations in the said will of the said Jonas Stawell contained to the said settled estates, the trustees or trustee of the said term should after the decease of the survivor of them the said William Alcock Stawell and Charlotte Stawell by mortgage or sale of the said lands comprised in the said term levy and raise the said sum of 6000*l.* to be paid and payable in such shares and during the lifetime of the said William Alcock Stawell as he by any direction in writing, to be attested by two or more witnesses, should direct or appoint, and in default of such direction or appointment the same to vest in such child or children being a younger son or sons at the age of twenty-one years, or being a daughter or daughters at the age of twenty-one years or day of marriage, and to be paid and payable to him, her, or them at the same age, provided the same did not happen until after the decease of the said William Alcock Stawell and Charlotte Stawell, but if the same should happen in their lifetime or in the lifetime of the survivor of them, then the portion of such younger child or children to be postponed until the decease of the survivor of them, unless they jointly during their joint lives or the survivor of them after the decease of the other of them should signify their, his, or her consent in writing under their, his, or her hands or hand that the same should be sooner raised, and in default of

such direction or appointment by the said William Alcock NEVILLE J. Stawell to go to and be shared and allotted to or among such child or children not being an eldest son in such manner, shares, and proportions and to be paid at such days and times as the said Charlotte Stawell should by any deed or deeds or by will direct and appoint, and for want of such direction or appointment of the said William Alcock Stawell and Charlotte Stawell or either or them to go and be shared and divided between or among all such children except an eldest or only son in equal parts, shares, and proportions, share and share alike, to be and become a vested interest or interests, and to be paid and payable at the ages and times following, that is to say, the share or shares of such of them as shall be a son at the age of twenty-one years, and being a daughter at that age or day of marriage, but in case any such child being a son shall attain the age of twenty-one years or being a daughter shall attain that age or be married in the lifetime of the said William Alcock Stawell and Charlotte Stawell or the survivor of them, then the payment of his, her, or their shares shall be postponed until after the decease of them the said William Alcock Stawell and Charlotte Stawell, unless they jointly during their lives or the survivor of them shall by writing under their, his, or her hands signify a desire that the same shall be sooner raised; provided that notwithstanding the postponing of the payment of such portion or portions until after the decease of the said William Alcock Stawell and Charlotte Stawell all and every such portion should be considered as vested interests in such of the younger sons as should attain the age of twenty-one years and in such of the said daughters as should attain that age or be married in the lifetime of their said parents or the survivor of them. " Provided always that if any one or more of such younger children being a son shall depart this life before he shall attain the age of twenty-one or become an eldest son, or being a daughter shall depart this life before she shall attain that age or be married, then and in such case, no direction or appointment having been made or given by the said William Alcock Stawell to the contrary, as well the original shares of every such son so dying or becoming an eldest son and of every such daughter so dying under the age of twenty-one years without

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NEVILLE J. being married or so much thereof as shall not have been advanced for him or her as also such parts or shares as by virtue of this present clause shall have accrued unto the sons and daughters last mentioned shall go and belong to the survivors or survivor of them and the same shall be paid and payable at such days and times and shall go in the same manner to such survivors or survivor as his her or their original share or shares." And the settlement contained usual clauses for the maintenance and advancement of such younger children of the said marriage for whom a portion or portions were intended to be provided as aforesaid until his, her, or their respective portions should become payable, and for the merger of the said term of 1000 years.

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—

There were three children of the marriage, namely, Jonas, born in 1846, William, born in 1850, and Esther, born in 1857, and they all attained the age of twenty-one years.

By a deed dated April 12, 1871 (to which Charlotte Stawell and the then trustees of the term of 1000 years were parties), William Alcock Stawell appointed that the said sum of 6000*l.* in the marriage settlement mentioned should after the deaths of himself and his wife Charlotte be paid to William Stawell and Esther Stawell in the following proportions, that is to say, 3000*l.*, part thereof, to the said William Stawell, to vest in him immediately on the execution of the indenture, but to be postponed in payment until the decease of the said William Alcock Stawell and Charlotte Stawell, and the sum of 3000*l.*, the other part thereof, to the said Esther, to vest in her on attaining the age of twenty-one years or day of marriage, but to be postponed until after the said deaths.

In 1882 Charlotte Stawell died without having exercised her powers of appointment under the marriage settlement.

By deed dated June 21, 1897, and made between William Stawell (who had assumed the surname of Riversdale) of the first part, the then trustees of the term of 1000 years of the second part, William Alcock Stawell of the third part, and certain persons as mortgagees of the fourth part, after reciting (amongst other things) that William Alcock Stawell had agreed to join in the now stating indenture for the purpose of signifying that

the said sum of 3000*l.* to which the said William Stawell Rivers- NEVILLE J.
dale was entitled under the said will of Jonas Stawell and the 1909
said deeds of September 17, 1845, and April 12, 1871, or one STAWELL'S
of them, should be raisable on the execution of the now stating TRUSTS,
indenture and bear interest from the date thereof as therein *In re.*
mentioned, it was witnessed that William Stawell Riversdale, POOLE
as beneficial owner, thereby conveyed to the mortgagees, their *v.*
executors, administrators, and assigns, the said sum of 3000*l.* RIVERSDALE.
to which he was entitled as aforesaid, being one-half of the 6000*l.*
charged by the said will and marriage settlement upon the
settled estates, to secure the repayment of the sum of 1800*l.*
then advanced to him with interest thereon as therein mentioned;
and it was thereby declared that the said sum of 3000*l.* thereby
conveyed should be forthwith, on the execution of the now
stating indenture, raisable and payable, and should thenceforth
bear interest at the rate of 5*l.* per cent. per annum until the said
sum of 3000*l.* should be raised and paid. This mortgage was in
1899 transferred to and was now vested in the defendant MacIvor.

Jonas Stawell, the eldest son, died in February, 1900, intestate
and without issue, and the defendant Esther Stawell Riversdale
was his legal personal representative.

William Alcock Stawell died in June, 1905, and thereupon
William Stawell Riversdale, the second son, became tenant in tail
in possession of the settled estates.

William Stawell Riversdale died in May, 1907, without issue,
having by his will appointed his wife, the defendant Caroline
Riversdale, his sole executrix and residuary devisee and legatee.

On the death of William Stawell Riversdale his sister Esther
Stawell (who assumed the surname of Riversdale) became entitled,
under the limitations over in the said will of her grandfather
Jonas Stawell, to an estate tail in the settled estates.

No part of the sum of 6000*l.* had been raised, and this
summons was taken out by the trustees of the term to determine
whether that sum or any part thereof was, in the events which
had happened, now payable, and to whom.

Church, for the plaintiffs.

Butcher, K.C., and *Dighton Pollock*, for the defendant Esther

NEVILLE J. Stawell Riversdale. The estate of William Stawell Riversdale
 1909 is not entitled to have the 3000*l.* raised and paid. Under the
 STAWELL'S will Charlotte alone had power to fix the period for payment
 TRUSTS, of the portions, and she could not delegate that discretionary
In re. power to her husband, and no device by which the time for
 POOLE raising and paying the portions of the younger children is
 v. left to the discretion of the husband is valid. Therefore the
 RIVERSDALE. husband could not by the deed of 1897 accelerate the period
 — of distribution. But even if he could do so, the gift over in
 the accruer clause took effect, so that William on becoming
 the eldest son could not retain his portion whether it had
 been paid over or not. But if our construction of the docu-
 ments is wrong, there is nothing in the will or settlement to
 prevent the application of the general rule that a younger son
 on becoming the eldest son and succeeding to the estates is not
 to share in the portions fund: *Chadwick v. Doleman* (1); *Jermyn*
v. Fellows (2); *Lord Teynham v. Webb* (3); *Broadmead v. Wood* (4);
Sandeman v. Mackenzie (5); *Gray v. Earl of Limerick* (6);
Collingwood v. Stanhope (7); *In re Bayley's Settlement*. (8)

Jenkins, K.C., and *Tindal-Robertson*, for the defendant Caroline Riversdale. The settlement is good so far as it is authorized by the will, and under the will the wife had power to appoint that the portions should be payable "at such times or time and in such manner and form" as she should direct. She could therefore authorize her husband to accelerate the time for payment. It is immaterial if the husband's appointment of 1871 is ultra vires, because at that date both William and Esther had attained twenty-one and had vested interests in the fund subject to any appointment that might be made: *In re Prytherch* (9); *Windham v. Graham* (10); and the gift over took effect only if a younger son became the eldest son before attaining twenty-one. The mortgage of 1897 operated as a direction by the husband that William's portion should be raised and be payable immediately,

(1) (1705) 2 Vern. 528.

(6) (1848) 2 De G. & Sm. 370, 378.

(2) (1735) Cas. t. Tal. 93.

(7) (1869) L. R. 4 H. L. 43, 53.

(3) (1750) 2 Ves. Sen. 198.

(8) (1870) L. R. 9 Eq. 491; on

(4) (1780) 1 Bro. C. C. 77.

appeal, (1871) L. R. 6 Ch. 590.

(5) (1861) 1 J. & H. 613.

(9) (1889) 42 Ch. D. 590.

(10) (1826) 1 Russ. 331.

and when once a portion is paid it cannot be recovered back: NEVILLE J
Leake v. Leake (1); Sugden on Powers, 8th ed. p. 680; Farwell
 on Powers, 2nd ed. pp. 502-3.

Peterson, K.C., and *Carr*, for the mortgagees, adopted the same
 line of argument and referred to *In re Smyth's Trusts.* (2)

Butcher, K.C., in reply.

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Cur. adv. vult.

Jan. 23. NEVILLE J., after stating the facts, continued:—The question is whether upon William's succession to the estates he remained entitled to the 3000*l.* dealt with by the deed of 1897. The rule referred to in *Collingwood v. Stanhope* (3) is plain. Where in a settlement portions are provided for younger children, "the eldest son" is interpreted to mean the son who takes the estates in possession irrespective of the date of his birth. The character of "eldest son" is to be ascertained at the time appointed for payment of the portions—per Lord Westbury in *Ellison v. Thomas* (4)—or, as it is put elsewhere, at the period of distribution. This, however, is not a rule of law, but a rule of construction, and can only be applied in cases where it is not inconsistent with the terms of the settlement. In *Lord Teynham v. Webb* (5), Lord Hardwicke, speaking of Lord Cowper's decision in *Chadwick v. Doleman* (6), says: "Lord Cowper . . . inferred a tacit condition," (in the case of an appointment) "that the capacity of being a younger son should continue, until the time of payment came," and points out that the same condition must apply in default of appointment. It is upon this that the statement in Sugden appears to be founded (Sugden on Powers, 8th ed. p. 680): "Of course the change of character must take place before the receipt of the money. Clearly a younger son becoming eldest, and taking the estate itself, cannot be called upon to refund a portion received out of the estate whilst he was a younger child, and in that character." In Farwell on Powers, 2nd ed., p. 503, referring to a passage in *Collingwood v. Stanhope* (3) stating that a child who at the period of distribution has become an

(1) (1805) 10 Ves. 477.

(2) (1861) 12 Ir. Ch. Rep. 487.

(3) L. R. 4 H. L. 43, 53.

(4) (1862) 1 D. J. & S. 18, 27.

(5) 2 Ves. Sen. 198, 210.

(6) 2 Vern. 528.

NEVILLE J. eldest child is no longer entitled to a portion, even if he has
 1909 had a portion assigned to him, the learned author adds, "This
 STAWELL'S would appear to extend to cases where the portion has been
 TRUSTS, not merely appointed but has actually been paid over, if such
In re. payment has not been made by means of a release of the
 POOLE appointor's life interest"; and, with reference to Lord St.
 v. LEONARDS' statement above mentioned, says it can hardly
 RIVERSDALE be intended to apply to cases where the portion has been
 advanced before the period at which it would have been naturally
 payable. I think it is consistent with what is said by both
 learned authors that a payment will be final if made in accord-
 ance with the terms of the settlement, or (where the period for
 distribution has been accelerated by the release of the prior life
 estate) upon the eldest son actually succeeding. Payment when
 made in accordance with the terms of the settlement is, in my
 opinion, final and irrevocable. The mere vesting of the portion,
 whether by appointment or otherwise, however, will not be
 sufficient to exclude the rule: *Chadwick v. Doleman*. (1) In the
 present case there is an express limitation over in the accruer
 clause in the settlement which in my opinion is equivalent in its
 operation to the rule applicable in cases where there is no such
 limitation. It has been argued that this limitation should be
 construed to take effect only in the case of a son becoming an
 eldest son before the age of twenty-one, but that is not the
 grammatical construction of the limitation, and I do not think there
 are reasons sufficient to justify a departure from the ordinary
 meaning of the words used, particularly as such a construction
 would not prevent the application of the rule: see *In re Bayley's*
Settlement. (2) The limitation over must, however, be confined
 to the happening of the contingency within some definite period,
 which I think must be the period before payment. To hold that
 it takes effect upon the happening of the event at any time up to
 and including actual succession to the estates would be to defeat
 the expressed intention of the instrument that payment should
 be made at an earlier date with the consent of the tenant for life.
 It appears to me that a direction for payment excludes the idea
 of subsequent divesting. In the present case the portions were

(1) 2 Vern. 528.

(2) L. R. 6 Ch. 590.

vested in and payable to sons at twenty-one, or daughters at twenty-one or marriage, unless such events happened during the lifetime of the husband and wife or of the survivor, in which case payment was postponed unless they or the survivor signified a desire that the same should be sooner raised. I think this was intended to enable an immediate provision to be made for any younger child, and that the time for payment to a son who had attained twenty-one arose when, after the death of the wife, the husband signified his desire that his portion should be raised. It is said that such a provision was in fact a delegation of her power by the wife, inasmuch as it enabled the husband to accelerate at his pleasure the payment of a portion to a younger child, but in my opinion it is within the power to appoint "at such times or time" as the wife should direct or appoint. To hold that these words contained in an executory direction in the will did not enable the appointor to direct payment of the portions until actual succession to the estates finally determined the question of which of the children were younger children would, I think, be too narrow a construction. The inconvenience of postponing the enjoyment of portions until their utility might have to a great extent determined seems to me to outweigh the disadvantage of providing a portion for a child who might possibly succeed to the estates. I hold, therefore, that the appointor with the consent of the tenant for life could direct payment to a child who was at the time of payment a younger child. It remains to be considered whether the mortgage of 1897 was equivalent to payment. The mortgage appears to proceed upon the footing that the appointment of the husband was valid. This was not so, but the portion of the son William at that date was 3000*l.*, the wife being dead, without having further executed her power, and the two younger children having attained twenty-one. In my opinion the trustees were bound upon the direction of the husband to raise and pay this sum to the son William, and the mortgage appears to me to amount to a direction so to do. After its execution it appears to me the trustees had not and would not now have any answer to an action by the mortgagor and the mortgagees to compel them to raise and pay the 3000*l.* From that date it appears to me to have

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NEVILLE J. become a charge upon the estate which the trustees held for the benefit of William and his assigns. In my opinion the representative of William is entitled to the 3000*l.* subject to the mortgage. The costs of this application must be paid out of the 6000*l.*; the costs of the trustees as between solicitor and client are to come out of income.

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TRUSTS,
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v.
RIVERSDALE.

Solicitors: *Eardley Holt, Lightly & Co.; Pollock & Co.; Freke Palmer; Lawrence & Mavro.*

H. L. F.

NEVILLE J. RICKETTS *v.* CHURCHWARDENS OF THE PARISH OF
ENFIELD.

1909
Jan. 26, 27,
28.

[1908 R. 1195.]

Landlord and Tenant — Building Estate — Restrictive Covenant — Lessor's Covenant not to infringe the Building Line on Plot adjoining demised Premises—Covenant running with the Land — "Assign" — Breach — Damages.

A covenant in a lease that the lessor and his assigns will not erect or permit to be erected any buildings in front of the building line on the land adjoining the demised premises is a covenant that "touches or concerns the thing demised" within the second resolution in *Spencer's Case*, (1582) 5 Rep. 16*b*; 1 Sm. L. C., 11th ed. p. 55, and therefore runs with the land.

A corporation, owners of a building estate, granted a lease of a plot of land to A. for ninety-nine years, and entered into a restrictive covenant as above with A., his executors, administrators, and assigns, in respect of the plot of land adjoining the demised premises. Afterwards they entered into a building agreement with B. in respect of the adjoining plot of land, under which B. was to submit his building plans to them for approval, and on approval was to build forthwith in accordance with the plans, and on completion of his buildings was to have a ninety-nine years' lease of the plot. On B.'s plans (which did not shew the building line) being approved, he forthwith erected his buildings which infringed the building line. On complaint by the assignee of A.'s lease, the corporation served B. with a notice to observe the building line, but took no further steps against him, and subsequently proposed to grant him his lease:—

Held, that the covenant in A.'s lease touched or concerned the thing demised and ran with the land so as to entitle his assignee to sue the corporation on the covenant.

Held, also, that B. was an "assign" of the corporation and that they were liable in damages for his breach of the covenant. NEVILLE J.

Semble, that even if B. was not an "assign," the corporation had under the circumstances "permitted" a breach of the covenant.

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 WARDENS.

ACTION.

The churchwardens of the parish of Enfield, in the county of Middlesex, incorporated by a private Act of Parliament passed in the reign of George III., possessed lands at Enfield, and part of their lands, fronting Windmill Hill at Enfield, had been laid out for building.

By deed dated December 22, 1904, and made between the churchwardens of the one part and one Battley of the other part, the churchwardens, in pursuance of the power of the said Act, demised to Battley a parcel of land on the south side of Windmill Hill, together with the dwelling-house recently erected thereon and more particularly delineated on the plan therein mentioned, for the term of ninety-nine years from June 24, 1901, at the rents and subject to the covenants and agreements on the part of the lessee thereafter contained, and the lessee, for himself, his heirs, executors, administrators, and assigns, covenanted with the churchwardens and their assigns (inter alia) that the lessee, his executors, administrators, or assigns, would not "erect or set up any erection, building or projection between the front boundary line of the land hereby demised and the line denominated on the said plan 'building line,' such line being drawn at a distance of thirty feet from the said front boundary line." And the lease contained the usual covenant by the churchwardens for themselves and their assigns for quiet enjoyment, and that "it shall be lawful for the churchwardens or any tenants or the assigns of the churchwardens from time to time to build on any part of the land adjoining or near to the premises hereby demised belonging to them to such height and in such manner as they may think fit Provided that they the said churchwardens or their assigns will not erect or permit to be erected on the adjoining land of the said churchwardens lying between the western boundary of the land hereby demised and a point of 110 feet east of the old Park Road any erection building or projection between the front boundary line of the

NEVILLE J. said adjoining land and the said building line drawn at a distance of thirty feet from the said front boundary line. And further to the intent to bind the whole of the said adjoining land within the distance aforesaid, so far as the said churchwardens can lawfully do so, that they the said churchwardens will not let or demise the same or agree so to do in such manner that the same or any part thereof can lawfully be used for any other purpose than the erection of a house or houses of a less prime cost than 800*l.* each nor used for any purpose except as a private or professional house and stabling and offices in connection therewith."

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WARDENS  
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By deed dated January 10, 1906, Battley for the considerations therein mentioned assigned the premises comprised in his lease of December 22, 1904, to the plaintiff for the residue of the term of ninety-nine years, and the plaintiff covenanted in the usual way with Battley to pay the rents and observe the covenants and conditions in the lease and to keep Battley indemnified against all liability in respect thereof.

On November 6, 1907, the churchwardens, as landlords and acting by their clerk, entered into a building agreement with one Thomas (therein called the tenant) with respect to the plot of land adjoining the west side of the plaintiff's said premises, which was the only plot fronting Windmill Hill not built upon. This agreement provided:

"1. The tenant may for the purpose only of building as herein stipulated enter upon the piece or plot of ground situate on Windmill Hill . . . ."

"2. The tenant shall forthwith proceed to erect upon the land the subject of this agreement and shall proceed continuously to cover in and complete fit for habitation and in a good substantial manner and with the best new materials of every description in accordance with plans, drawings, elevations, and specifications to be prepared by and at the expense of the tenant and to be approved by the landlords or their surveyor, and to the satisfaction in all respects of the landlords or their surveyor for the time being, one detached house with proper and suitable offices stabling and outbuildings drains and fences, the said messuage to be in the position and observing the building line to be

approved by the landlords or their surveyor and set back at least thirty feet from the front. But the tenant shall not proceed to erect any such buildings until plans, drawings, elevations and specifications of such proposed buildings and the proposed use to which the buildings are to be put have been submitted and approved by the landlords or their surveyor and such buildings shall be erected under the supervision and to the satisfaction in all respects of the landlords or their surveyor for the time being."

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Clause 3 provided that the house should be completely finished and ready for habitation by June 24, 1908.

"8. When and as soon as the said house shall have been built and roofed in and plastered in accordance with the stipulations hereinbefore contained the landlords shall grant to the tenant and the tenant shall accept from the landlords . . . a lease of the whole premises for a term of ninety-nine years from June 24, 1901, at the rents therein mentioned. Such lease shall be in the form and contain the conditions and provisions usually contained in the leases by the churchwardens of Enfield, which is known to the tenant, including a provision that the premises shall be used only as a private dwelling-house . . ."

Clause 10 provided that until the lease was granted the tenant should be deemed a tenant at will to the landlords of the land, and should be subject to the same rents, covenants, &c., as if the lease had been granted.

Clause 11 provided that, if the tenant made default in erecting and completing the house "within the time and in manner aforesaid," the landlords might re-enter upon and take possession of the premises and determine the agreement.

"12. The tenant shall not erect or permit to be erected any house or building on the land except the said messuage and stabling and offices. And shall not permit any erection except fence walls to be built in front of the building line to be named by the surveyor . . ."

Thomas, in accordance with this agreement, submitted his plans and specifications of the building he proposed to erect on the plot, and they were approved by the surveyor of the churchwardens. At the same time the surveyor produced to him a

NEVILLE J. plan of the building estate, shewing the building line, and told him that it must be observed. The building line was not marked on Thomas's plans. Thereupon Thomas, without further communication with the churchwardens, proceeded to build his house, and by March, 1908, had the walls up and the roof on. The plaintiff then observed that Thomas had run a square bay with side windows up the front of the house, and that this bay projected some four feet beyond the building line. He at once complained of the projection to the churchwardens, and after some correspondence they on April 16, 1908, served upon Thomas a notice requiring him to comply in all respects with the provisions of his building agreement, and in particular to observe the building line of thirty feet from the front boundary, and to pull down and remove all such parts of his buildings on the said plot as were not at least thirty feet from the front. Thomas did not comply with this notice, but went on and completed his house. Further correspondence on the matter then ensued between the plaintiff and the churchwardens, and ultimately on June 26, 1908, the solicitors of the churchwardens wrote to the plaintiff as follows:

“Adverting to the recent correspondence with regard to the building by Mr. Thomas on Windmill Hill, the churchwardens are advised that no breach of the covenant entered into by them with you has been committed.

“It cannot be denied that the house erected by Mr. Thomas is one of superior character to that which is required under the covenant with you: and it is considered that the erection of such a house is an improvement to the neighbourhood and adds to the value of your property: and also that the bay window which has formed the subject of your complaint is no real injury to the house belonging to you.

“More than six months have elapsed since the house was commenced, and we understand that it was roofed in more than four months ago; so that ample time has passed for any action to be taken that you may think necessary to protect your rights.

“Mr. Thomas has now called upon the churchwardens to grant the lease referred to in his agreement; and it is considered



that (even if you have any ground for complaint, which is doubted) the injury is of so trivial a nature as to render it unjust to longer delay the granting of the lease in consequence of the proceedings you have threatened. It is also believed that, if the Court should in any proceedings consider you entitled to any remedy, it would also consider damages a sufficient relief, and would refuse a mandatory injunction.

"We are therefore instructed to invite you to commence, within fourteen days from this date, such proceedings (if any) as you may be advised; and we are to inform you that in the absence of proceedings the churchwardens propose to grant Mr. Thomas or his nominee a lease of the house and premises erected by him in such form as they may be advised."

On July 8, 1908, the plaintiff issued the writ in this action against the churchwardens, claiming a mandatory order on the defendants to pull down the bay window, an injunction to restrain the defendants from erecting or permitting to be erected or permitting to continue any erection, building, or projection on the said land in front of the said building line, and damages. At the trial it was admitted that the plaintiff was too late to ask for a mandatory injunction and that the only question was whether he was entitled to any damages. It appeared from the evidence that Thomas's house was on higher ground than the plaintiff's, and that the bay window overlooked the plaintiff's front garden and to some extent the bed-room on the first floor of his house, and also partially obscured the plaintiff's view uphill from his house. The plaintiff claimed damages for loss of view, loss of privacy, and loss of value in his house. His experts assessed the damage on these heads at from 100*l.* to 128*l.* On the other hand the defendants' experts asserted that the damage to the plaintiff's premises was so trivial that it could not be assessed at any appreciable sum.

*Butcher, K.C.*, and *Horace J. Rowlands*, for the plaintiff. The defendants have covenanted that they and their assigns will not erect any building or erection beyond the building line. They are liable for the acts of Thomas (1.) because he is their assign and (2.) because they permitted the erection. *Lord Manners v.*

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NEVILLE J. *Johnson* (1) is a clear authority that the erection in this case is a "building" and that the invasion of privacy is a good ground for damages. But as the plaintiff is asking for legal damages he must shew that he is entitled to sue on the covenant, i.e., that the covenant runs with the land. According to the rule laid down by Lord Ellenborough in *Congleton Corporation v. Pattison* (2), the covenant must affect the nature, quality, or value of the thing demised or the mode of enjoying it. That rule was adopted by Lord Russell C.J. in *Horsey Estate, Ltd. v. Steiger* (3) and in *Rogers v. Hosegood* (4), where the cases are summed up. *Jourdain v. Wilson* (5) and *Sampson v. Easterby* (6) are strong instances of the rule. [They also referred to Foa on Landlord and Tenant, 3rd ed. pp. 378—380, and *Thomas v. Hayward*. (7)] Further, Thomas was an "assign" of the defendants within the meaning of the covenant: *Taite v. Gosling* (8); Bacon's Abridgment, 7th ed., tit. Assignment, vol. i. p. 329; *Metcalfe v. Westaway* (9); *Everett v. Remington* (10); *Bryant v. Hancock & Co.* (11); *Friary Holroyd & Healey's Breweries, Ltd. v. Singleton*. (12) In any case the defendants "permitted" the erection of these buildings, for Thomas was bound by his agreement to build only according to plans approved by the defendants, and when they found that he was not observing the building line they took no active steps to stop him, but proposed to grant him a lease after they knew of the breach. *Hall v. Ewin* (13) does not help the defendants, because in that case the defendant was not an "assign."

*Jenkins, K.C.*, and *Maugham*, for the defendants. The question is, first, whether the covenant runs with the land so that the plaintiff can sue on it, or whether it is collateral; and, secondly, whether there has been a breach for which the defendants are liable. The law of landlord and tenant stands by itself, and a covenant to run with the land must directly touch or concern

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|-----------------------------------------------|-----------------------------|
| (1) (1875) 1 Ch. D. 673.                      | (7) (1869) L. R. 4 Ex. 311. |
| (2) (1808) 10 East, 130.                      | (8) (1879) 11 Ch. D. 273.   |
| (3) [1899] 2 Q. B. 79, 89.                    | (9) (1864) 13 W. R. 181.    |
| (4) [1900] 2 Ch. 388, 395.                    | (10) [1892] 3 Ch. 148.      |
| (5) (1821) 4 B. & Al. 266.                    | (11) [1898] 1 Q. B. 716.    |
| (6) (1829) 9 B. & C. 505; (1830) 6 Bing. 644. | (12) [1899] 2 Ch. 261.      |
|                                               | (13) (1887) 37 Ch. D. 74.   |

the land demised. "Value" does not affect the question. The plaintiff must shew that a lessor's covenant not to do something on adjoining land directly touches the land demised. A covenant to build a house on the demised land does not run with the land, and it is doubtful how far a lessor's covenant runs with the land so as to bind his assigns. The cases are collected and discussed in the notes to *Spencer's Case* (1) in Smith's Leading Cases, 11th ed. vol. i. pp. 78—88, including *Austerberry v. Oldham Corporation*. (2) In *Woodall v. Clifton* (3) an option to purchase the freehold was held not to run with the land. *Congleton Corporation v. Pattison* (4) and *Thomas v. Hayward* (5) are in our favour. In *Sampson v. Easterby* (6) the site on which the smelting mill was to be erected was included in the demise. *Rogers v. Hosegood* (7) was a case of grantor and grantee and has no application to a case of landlord and tenant. The cases on restrictive covenants between grantor and grantee are collected in Seton on Judgments, 6th ed: p. 539. *Rogers v. Hosegood* (7) is one of them, and was followed in *Forster v. Elvet Colliery Co.* (8) No case has been cited where a covenant by a lessor to deal with adjoining land in a restrictive manner has been held to run with the demised land. To run with the land it must be a covenant to do or not to do something on the demised land itself, but a covenant to do or not to do something on other land which may affect the value of the land demised is purely collateral: *Dewar v. Goodman*. (9) Further, having regard to the context in the lease, no particular intention is shewn to make the covenant sued on run with the land. The inference, on the contrary, is the other way, because in the covenant immediately following the parties expressly seek to bind the land. Secondly, Thomas is not an "assign" within the meaning of the covenant. The defendants are a corporation and cannot covenant for themselves and "their heirs" like an individual. "Assigns," therefore, is

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(1) 5 Rep. 16a.

(2) (1885) 29 Ch. D. 750, 776.

(3) [1905] 2 Ch. 257, 278.

(4) 10 East, 130.

(5) L. R. 4 Ex. 311.

(6) 9 B. & C. 505; 6 Bing. 644.

(7) [1900] 2 Ch. 388.

(8) [1908] 1 K. B. 629; in H. L. sub nom. *Dyson v. Forster*, 25 Times L. R. 166, since reported [1909] A. C. 98.

(9) [1907] 1 K. B. 612; on appeal, [1908] 1 K. B. 94; in H. L. 25 Times L. R. 137, since reported [1909] A. C. 72.

NEVILLE J. here properly used instead of "heirs" and does not include a tenant. If there is an ambiguity in the covenant it should be construed in our favour: *German v. Chapman*. (1) Lastly, if a cause of action accrued to the plaintiff, "permission" to commit the breach must have been given before the writ was issued; but Thomas's agreement was in accordance with the building line, and he infringed it without our knowledge.

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[NEVILLE J. True; but the contract was to build "forthwith" and under the supervision of the defendants' surveyor, and the defendants did nothing.]

Thomas's plans did not shew that he intended to build in front of the building line. He was not our servant and we are not liable for his acts: *Wilson v. Twamley*. (2) Assuming there was no "permission" until the letter of June 26, that letter does not amount to permission. "To permit" means "to authorize." We did not authorize the breach. To say that we propose to grant the lease may be equivalent to a threat that "we are going to authorize" and may support an injunction, but not a writ for damages. The plaintiff must shew that we have authorized. If we are wrong, the damages are exaggerated, and on our evidence it is a case for merely nominal damages.

NEVILLE J. The first question in this case is whether the benefit of the defendants' covenant in their lease to Battley runs with the land so as to enable the plaintiff, who is the assignee of that lease, to sue upon it for damages. That must depend upon whether the covenant "touches or concerns the thing demised," or whether it is a collateral personal covenant. In *Spencer's Case* (3) the Court was dealing with a case between landlord and tenant, and the second resolution laid down that a covenant must "touch or concern" the thing demised in order to run with the land. Now here the covenant in question is that the lessors and their assigns will not erect or permit to be erected on the land adjoining the demised premises any building in front of the building line. Does that covenant "touch or concern" the land demised? If I were left to my own unaided

(1) (1877) 7 Ch. D. 271.

(2) [1904] 2 K. B. 99.

(3) 5 Rep. 16a, 16b; 1 Sm. L. C., 11th ed. p. 55.



judgment I should say it does, because it seems to me that there is a difference in the nature of the thing demised according as it has or has not a right of outlook attached to it. But I am not left to my own unaided judgment in considering the question, because I think an analogous question arose in *Rogers v. Hosegood*. (1) That was not a case of landlord and tenant, but of vendor and purchaser, and the question was whether a restrictive covenant by a purchaser not to build in a particular way on the plot of land conveyed to him ran with the land so as to enable an assign of another plot to enforce the covenant. As I understand that case, the decision was that the covenant did "touch or concern" the land, and I cannot but think that those words are used in the judgment of the Court of Appeal with reference to the second resolution in *Spencer's Case*. (2) Collins L.J., in delivering the considered judgment of the Court, says (3): "Here, again, the difficulty is narrowed, because by express declaration on the face of the conveyance of 1869 the benefit of the two covenants in question was intended for all or any of the vendor's lands near to or adjoining the plot sold, and therefore for (among others) the plot of land acquired by Sir John Millais, and that they 'touched and concerned' that land within the meaning of those words so as to run with the land at law we have no doubt." I can see no distinction between the covenant here not to build beyond the building line and a covenant not to build in a particular way. It seems to me, therefore, that I have the guidance of the Court of Appeal in considering whether the covenant in the present case touches or concerns the thing demised so as to run with the land at law. But then it is urged that *Rogers v. Hosegood* (1) was not a case of landlord and tenant, and cases have been referred to in which it is said a distinction is drawn between the cases of a landlord and tenant and the case of a vendor and purchaser. It is said that as between landlord and tenant a covenant does not run with the land unless it affects something to be done or not to be done on the land itself, and *Dewar v. Goodman* (4) was cited as an authority for that proposition, but

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(1) [1900] 2 Ch. 388.

(3) [1900] 2 Ch. 404.

(2) 5 Rep. 16a, 16b; 1 Sm. L. C. 11th ed., p. 55.

(4) [1907] 1 K. B. 612; [1908] 1 K. B. 94; [1909] A. C. 72, 77.

NEVILLE J. I am of opinion that it does not go to that extent. That case went to the House of Lords, and there Lord Collins says :  
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“The reason why the covenant to do something on land other than that demised presumably does not run is not because there is no privity of estate in the land on which the covenant is to be performed, but because such a covenant is *prima facie* collateral, i.e., does not touch or concern the land demised. But instances may be imagined of covenants to do things on land other than that demised which touch and concern so nearly the land demised as to run with it. Of this *Sampson v. Easterby* (1) is an instance, if it be assumed, as it seems to have been, that no demise was to be implied of the site on the waste where the mill was to be built. *Vyvyan v. Arthur* (2) is another instance where there was no privity of estate in the land on which the covenant was to be performed, but on special grounds the covenant was held to run.” That, in my opinion, is a distinct authority that as between landlord and tenant a covenant may touch and concern the land demised, although nothing has to be done on the land demised. Then when I turn to *Sampson v. Easterby* (1) I find that Lord Tenterden, in delivering the judgment of the Court, said : “The rule as to the covenants that do or do not pass to and bind an assignee is laid down in *Spencer’s Case* (3), upon which all the subsequent cases are founded. It is there said that if there be a covenant to make a new wall upon some part of the thing demised, it shall bind the assignee ; and when the cases of covenants not binding the assignee are mentioned, they are said to be of things to be done that are merely collateral to the land, and that do not touch or concern the thing demised in any sort ; and a covenant to build a house on other land of the lessor is mentioned only as an instance, and must therefore be understood of a house not touching or concerning the land demised.” I gather from that that Lord Tenterden thought it was possible that a covenant to build on land not demised might nevertheless touch or concern the land demised. That case went to the Exchequer Chamber, and there Alexander C.B., in delivering the judgment of the Court, says (4) : “Much of the argument here has

(1) 9 B. &amp; C. 505, 516.

(3) 5 Rep. 16b.

(2) (1823) 1 B. &amp; C. 410, 415.

(4) 6 Bing. 644, 652.

turned on the assertion that there is no connection between the NEVILLE J. smelting mill and the mines; but the demise is of mines, and of 1909  
 ‘smelting mills . . . and buildings standing and being upon RICKETTS  
 any of the said commons, moors or wastes, with full power to have v.  
 heap-room upon the said moors, &c., for laying and placing the ENFIELD  
 ores dug out of the mines’; and it is impossible to doubt that the CHURCH-  
 demise of the mines is immediately connected with the possession WARDENS.  
 of the smelting mill. The case, therefore, falls within the principle  
 laid down by Lord Ellenborough in the decision referred to (1),  
 and this was an interest running with the land.” I think, there-  
 fore, that the basis of the decision in *Sampson v. Easterby* (2) is that  
 the covenant to build a smelting mill was so related to the land  
 demised that it “touched or concerned” it, and ran with the land,  
 although what was to be done was on land not demised. I come  
 to the conclusion, therefore, that the covenant in the present case  
 does touch or concern the land demised, with the result that the  
 plaintiff, as the assignee of Battley, has the right to sue the  
 defendants for damages on the covenant.

The next question is whether there has been a breach of the covenant. On this point the facts are not in dispute, but it is said that the erection which infringes the building line has not been built by the lessors nor by their assigns, and that the defendants have not permitted its erection. That leads me to the covenant, and I have to put a construction upon it. Now the covenant is not expressed in very grammatical language, but I think that what it means is this, that neither the lessors nor their assigns will erect or permit to be erected any building on the adjoining plot in front of the building line; so that, if the assigns erect a building infringing the building line, it will be a breach of the covenant. It is said that Thomas is not “an assign” of the lessors because his only interest in the land is under the conditional agreement for a lease. Now I think, looking at the context of the covenant in the lease, that “assigns” must mean the persons who are in possession of the adjoining land deriving title from the defendants, because they are the only persons who could erect a building on the land. I hold, therefore, that Thomas is an “assign” within the meaning

(1) 10 East, 130.

(2) 9 B. &amp; C. 505, 516.

NEVILLE J. of that covenant, and consequently that the defendants are  
1909 liable for his breach of the covenant. If Thomas was not an  
RICKETTS assign, it is said that the defendants have not "permitted"  
v. the breach. With regard to that the facts are shortly these.  
ENFIELD Under the building agreement Thomas was not entitled to  
CHURCH- build in front of the building line. His plans had to be sub-  
WARDENS. mitted to the defendants for their approval. The plans he sub-  
mitted did not shew the building line, but they were approved by  
the surveyor of the defendants. The land was the only remaining  
plot not built upon, and they appear to have taken no further  
interest in the matter after their surveyor had approved the  
plans. Thomas went on the land and built his house in such a  
way that part of it was in front of the building line. Complaint  
was then made by the plaintiff, and the defendants served on  
Thomas a formal notice requiring him to observe the building  
line and to pull down what he had erected in breach of it, but  
no further steps were taken against him, and he went on and  
finished the house. Ultimately the defendants directed that  
notice should be given to the plaintiff that unless he commenced  
proceedings within a fortnight they should grant a lease to  
Thomas, and the reason they gave for that was that they thought  
it would be hard on Thomas to have to pull down the bay  
window. The result was that this action was brought. Those  
I hold to be the facts. It is not necessary for me to decide  
whether what was done by the defendants amounted to a per-  
mission of the breach, because, having regard to the opinion I  
have expressed on the other points in the case, this point is not  
material. I hold that the defendants are liable in damages,  
which I assess at 55*l.*, and I give the plaintiff the costs of the  
action.

Solicitors: *W. T. Ricketts & Son; Dixon, Weld, Dixon & Beavan.*

H. L. F.



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[1906 G. 704.]

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GOATLEY *v.* JONES (No. 2).

Feb. 9.

[1908 G. 1346.]

*Practice—Married Woman—Separate Estate—General Power of Appointment—Costs—Execution—Elegit—Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 1, sub-s. 2.*

Real property over which a married woman and her husband have a joint general power of appointment by deed cannot be taken in execution under a writ of elegit, issued under an order for payment of costs by the married woman and her husband, by which execution against the married woman is limited to her separate estate.

An action, *Goatley v. Jones* (No. 1), was brought by the trustee in bankruptcy of Henry Robert Jones against him, his wife, Eleanor Jones, and their two infant children, to set aside a settlement as executed to defraud creditors. The settlement included certain real estate at Brighton, which was thereby settled to such uses as the husband and wife should by deed jointly appoint, and subject thereto in trust for the separate use of the wife for life, with remainder in trust for the children in equal shares. Of this settlement Eleanor Jones was the sole surviving trustee. By the judgment in this action, dated June 21, 1907, the settlement was set aside except so far as it related to the Brighton property, and the defendants Henry Robert and Eleanor Jones were ordered to pay the costs of the plaintiff except the costs occasioned by the claim to set aside the settlement so far as it related to the Brighton property (which were ordered to be paid by the plaintiff and set off), but any costs payable by the defendant Eleanor Jones were ordered to be paid out of her separate property, and it was ordered that execution thereon should be limited to the separate property of the defendant Eleanor Jones not subject to any restriction against anticipation, unless by reason of s. 19 of the Married Women's Property Act, 1882, the property should be liable to execution notwithstanding such restriction.

NEVILLE J. The defendant Henry Robert Jones died in October, 1907.  
1909 The judgment was registered under the Land Charges Act, 1900  
GOATLEY (68 & 64 Vict. c. 26), after his death.

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(No. 1). On February 26, 1908, an order was made under the Rules of  
GOATLEY the Supreme Court, Order XLII., r. 23 (a), giving leave to issue  
v. execution notwithstanding the death of Henry Robert Jones. The  
JONES plaintiff then sued out a writ of elegit in the usual form directing  
(No. 2). the sheriff to deliver "All such lands &c. as the said Henry  
Robert Jones and Eleanor Jones or any other person or persons in  
trust for them or either of them was or were seised or possessed of  
on the said 21st day of June 1907 or at any time afterwards  
or over which the said Henry Robert Jones and Eleanor Jones  
on the said 21st day of June 1907 or at any time afterwards  
had any disposing power which they might without the assent  
of any other person exercise for their own benefit." But as  
regarded Eleanor Jones execution thereunder was limited to her  
separate property in the words of the judgment.

At an inquisition held in pursuance of the writ of elegit it  
was found that the said Henry Robert Jones and Eleanor Jones  
had at the date of the judgment and afterwards until the death  
of the said Henry Robert Jones a joint disposing power over  
the property at Brighton which they might jointly, without the  
assent of any other person, have exercised for their own benefit  
or for the benefit of either of them, and, further, that the said  
Eleanor Jones had been since the death of the said Henry  
Robert Jones seised of the premises in her demesne as of fee  
in trust for herself for the term of her natural life as her separate  
property not subject to any restraint against anticipation.

In pursuance of this finding the sheriff delivered the Brighton  
property to the plaintiff, and the plaintiff brought the action,  
*Goatley v. Jones* (No. 2), for a sale of the property. Eleanor Jones  
was the sole defendant to this action, and, she being out of the  
jurisdiction, the plaintiff was obliged to proceed by action instead  
of by summons. The official solicitor applied by motion in the  
action *Goatley v. Jones* (No. 1), on behalf of the infant children of  
Henry Robert and Eleanor Jones, to set aside or vary the order  
giving leave to issue execution made in that action, and the writ  
of elegit and the return thereon, at least so far as they affected

the interest of the infants. This motion and the action *Goatley* NEVILLE J. v. *Jones* (No. 2) came on together.

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*Jenkins, K.C.*, and *S. G. Lushington*, for the plaintiff, argued at some length that the execution was good against the infant children though the judgment was not registered until after the death of Henry Robert Jones, when the joint power of appointment had ceased to exist, but in the view the Court took of the case it became unnecessary to decide this point.

*Peterson, K.C.*, and *Methold*, for the infants. The execution so far as Mrs. Jones is concerned is limited to her separate estate, in accordance with s. 1, sub-s. 2, of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75). It has been decided under that Act that a power is not property: *Ex parte Gilchrist*. (1) That case would be conclusive against the plaintiff even if Mrs. Jones were sole donee of the power. But the power is a joint one, and she is not within the words of the writ of elegit, for she never could dispose of the property without the assent of any other person; it would not therefore be part of her separate estate.

*Jenkins, K.C.*, in reply. The form of order limiting execution to Mrs. Jones' separate estate, which is in the form settled in *Scott v. Morley* (2), only applies to that part of the judgment which is several against her and under which her property is only liable under the Married Women's Property Act, 1882. It cannot apply to the land which she and her husband had joint power to appoint, and which is liable under the Judgment Acts and which have nothing to do with the Married Women's Property Acts. In any case her life interest in the property can be taken in execution and ought to be sold.

NEVILLE J. In this case the question is whether real property, over which a married woman has a general power of appointment jointly with her husband, can be taken in execution under an order to pay costs out of her separate estate in an action to which she and her husband were joint defendants—that is, whether execution can be levied on this property under the

(1) (1886) 17 Q. B. D. 521.\*

(2) (1887) 20 Q. B. D. 120.

NEVILLE J. Married Women's Property Act, s. 1, sub-s. 2, which, after providing that a married woman may be sued, proceeds, "and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property and not otherwise." I cannot take this as a judgment against Mr. and Mrs. Jones jointly, but as a judgment against Mr. Jones and the separate estate of Mrs. Jones, and it is plain from the case of *Ex parte Gilchrist* (1) that the property subject to this power is not part of her separate estate. If the judgment could be treated as a several judgment against Mrs. Jones, then this is not property over which she had a disposing power without the assent of any other person, and it is not within the words of the writ. The writ of elegit and the return must be amended so that it does not affect the infants' interest in the Brighton property. There may be an order for sale of Mrs. Jones' life interest. The plaintiff must pay the official solicitor's costs of the motion and as guardian of the infants relating to the motion.

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(No. 1).  
GOATLEY  
v.  
JONES  
(No. 2).  
—

Solicitors: *Young, Son & Ward*; *Official Solicitor*.

(1) 17 Q. B. D. 521.

J. R. B.



## NOREY v. KEEP.

PARKER J.

[1907 N. 47.]

1909

Feb. 5.

*Trade Union—Books and Accounts—Inspection—Right to employ Agent to inspect—Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 14; Sched. I., clause 6.*

By the Trade Union Act, 1871, s. 14, and Sched. I., clause 6, the rules of a registered trade union must contain provisions in respect of "the inspection of the books and names of members of the trade union by every person having an interest in the funds of the trade union."

The rules of a registered trade union provided that its books and accounts and list of members should be "open to the inspection of all the members thereof, and of all the persons having an interest in the funds, in accordance with the Trade Union Acts":—

*Held*, that members of the society were entitled to inspect the books and accounts by means of an accountant employed by them for the purpose, the accountant undertaking that the information obtained would only be used for informing his clients of the result of his inspection.

*Bevan v. Webb*, [1901] 2 Ch. 59, followed.

THE plaintiffs in this action were James Norey, a member of the executive council of the National Society of Operative Printers' Assistants (a registered trade union) and also a member of the society, and three other members of the council and of the society, against the other members of the council, claiming a declaration that each of the plaintiffs was entitled to inspect, by his accountant or firm of accountants, such books and accounts and list of members of the society as he was entitled under the Trade Union Acts to inspect. Rule 19 (12.) of the society provided as follows: "The books and accounts of the society and list of members shall be open to the inspection of all the members thereof, and of every person having an interest in the funds, in accordance with the Trade Union Acts, on one week's notice being given, on application to the committee."

The plaintiffs had sent in an application asking for inspection of the books and accounts and list of members by an accountant appointed by them for the purpose (to whom there was no

PARKER J. personal objection), but had been refused inspection by means of an accountant, although there was no objection to their making a personal inspection.

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The action of Norey in inquiring into the society's affairs was approved in a document signed by about 1300 members of the society.

The plaintiffs moved for a declaration in the terms above stated, and the motion was, by consent, treated as the trial of the action.

*Gore-Browne, K.C.*, and *Herman Cohen*, for the plaintiffs. By s. 13 of the Trade Union Act, 1871, a trade union, on applying for registration under the Act, has to send to the registrar printed copies of its rules, and by s. 14 the rules must contain provisions in respect of the several matters specified in the First Schedule to the Act. That schedule relates to "matters to be provided for by the rules of trade unions registered under this Act," and one of the matters is in clause 6 of the schedule stated to be "the inspection of the books and names of members of the trade union by every person having an interest in the funds of the trade union." In pursuance of the Act, the society was registered with rules, one of which, rule 19 (12.), provides for inspection by the members and every person having an interest in the society's funds, but is silent as to the employment by them of an agent to make the inspection. No objection is taken to inspection by any number of members personally, but those who are in office object to the inspection being made by an accountant. A similar question has been raised under other statutes and documents. In *Bevan v. Webb* (1) it was held that under articles of partnership and s. 24, sub-s. 9, of the Partnership Act, 1890, a partner was entitled to have the partnership books examined by an agent appointed by him for the purpose, although neither the articles nor the Act gave an express right to inspect by means of an agent. In that case *Collins L.J.* said that "prima facie a permission accorded to a specified person to do an act is accorded to him or his agents." (2) The books of the society are the property of the society, and the members

(1) [1901] 2 Ch. 59.

(2) [1901] 2 Ch. 68.

have a right to inspect them by means of a duly qualified agent: *Ex parte Buchanan*. (1)

*Martelli, K.C.*, and *J. M. Gover*, for the defendants. Such right of inspection as there is is given by statute, or by a rule which does not extend the statutory right, and cases arising on other statutory enactments which are identical in terms are not in point: *In re Balaghât Gold Mining Co.* (2) In that case the Court strictly construed s. 32 of the Companies Act, 1862, which gives the right to inspect the register of members, but no express right to make copies of it, and held that the latter right was not to be implied. Although, *prima facie*, the right to inspect may be exercised by the person to whom it is given, or by his agent, the whole of the document must be looked at to see whether only a right of inspection is given, and, looking at the rules generally, it is submitted that in this case only a right of personal inspection was intended. [They also referred to *In re Credit Co.* (3)]

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PARKER J. This action is brought for the purpose of enforcing the right of the plaintiffs to inspect the books and accounts of the society, and the question in dispute arises in this way. S. 14 of the Trade Union Act, 1871, provides that "with respect to the rules of a trade union registered under this Act, the following provisions shall have effect: (1.) The rules of every such trade union shall contain provisions in respect of the several matters mentioned in the First Schedule to this Act." One of the matters mentioned in the First Schedule to the Act is "the inspection of the books and names of members of the trade union by every person having an interest in the funds of the trade union."

Now I think that what that means is that in order to obtain registration under the Act the rules must provide and give to every person interested in the funds of the trade union the right to inspect the books and the names of the members, and I think it is clear that it was in pursuance of that obligation, when the rules of this society were framed, that sub-clause 12 of rule 19 was inserted, providing that "the books and accounts of the

(1) (1866) 15 W. R. 99.

(2) [1901] 2 K. B. 665, 667.

(3) (1879) 11 Ch. D. 256.

PARKER J. society, and list of members, shall be open to the inspection of  
1909 all the members thereof, and of every person having an interest  
NOREY in the funds, in accordance with the Trade Union Acts, on one  
v. week's notice being given, on application to the committee.”  
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It would appear, therefore, that persons interested in the funds of the society have a statutory, or any rate a semi-statutory, right—for the rule was made in accordance with the Act—to inspect the books and accounts of the society. I take it that members of the society have an interest in its funds, and therefore they are within not only the terms of the rules, but also the terms of the Act itself. It appears that Mr. Norey, being dissatisfied with the accounts and considering them incorrect, desired to investigate the books with the object of seeing whether he was correct in the view he took, or whether he was mistaken and the other members of the executive council were in the right, and he and others who supported him accordingly sent in an application to the council asking for an inspection of the books of account, not by themselves, but by an accountant whom they named for that purpose. I cannot discover anything unreasonable in that application, whatever the law may be. The letter was never dealt with by the society or the executive council, but was handed to the solicitor of the society, and the answer given practically amounted to this—that the applicants clearly had a right to inspect, but that the right was a personal one only, which might be exercised by any number of members, and that inspection by the one accountant named must be refused as there was no right to inspect by the applicants' agent.

The point is not an entirely new one, and the case to which I have been chiefly referred is *Bevan v. Webb*.<sup>(1)</sup> That was a case relating to the construction of articles of partnership and also incidentally to s. 24, sub-s. 9, of the Partnership Act, 1890, which confers on partners the right to inspect the partnership books. The question raised was whether the right was a personal one, or whether it could be exercised on behalf of a partner by an agent appointed by him for the purpose, and it was held that the right was one which might be exercised not only personally, but by an agent under proper conditions.

(1) [1901] 2 Ch. 59.



In considering whether a right of this kind is a personal right, or a right which can be exercised by means of an agent, it is important to consider with what object the right is conferred. Now it appears to me, both from the statute and from the rules, that the object is to enable the members, when they think that there is something wrong in the accounts of a society, to satisfy themselves whether anything is wrong or whether all is right by an inspection of the books. And when one considers that members of a society of this kind are not by reason of their training, any more than I am, really competent to examine the accounts or to obtain proper information from them, it is plain that the object with which the right of inspection is conferred by the Legislature and by rules would be almost if not entirely defeated if the right were held to be a personal right only. How are persons who are dissatisfied and suspect the accuracy of the accounts to satisfy themselves by a personal inspection? Large sums pass through the hands of this society, and dealings with these sums are necessarily of a somewhat complicated nature and involve numerous small payments, and probably the books of a society of this kind are in consequence voluminous. How an untrained man can from such books find out whether what he suspects is true, or whether he is mistaken, without resorting to some person of training, who is able, because of his training, to examine the accounts and draw inferences from them, and trace payments, I confess that I fail to see, and it appears to me that if I were to hold that the right of inspection was only a personal right I should be practically defeating the object with which the right was given. It is also obviously more convenient for a purpose of this kind that one person should examine the books than that a number of persons should do so.

I admit, of course, that what Mr. Martelli has said is perfectly true—that although a right of this kind is a right which, *prima facie*, is to be exercised by the person upon whom it is conferred, or by his agent, yet you may find in the document conferring the right something which shews, notwithstanding that *prima facie* admitted right, that what is conferred is to be considered as a personal right only—but, after carefully going through these

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PARKER J. rules, it does not appear to me that there is anything in them to negative what, prima facie at any rate, I consider to be reasonably clear, namely, that a right of this sort is a right given to enable the members to satisfy themselves as to the accuracy of the statement put before them by the executive of the trade union, and that that right, having regard to this object, is not a personal right only, but one which can be exercised by an agent for one or more members. I am of opinion, therefore, that the application of members asking that their accountant, who is admittedly an unobjectionable person, should have access to the books for the purpose of examining them was quite within the rules and perfectly reasonable. Therefore it appears to me that this action succeeds on the point of law.

Of course the accountant will, if the executive council of the trade union so desires, give the ordinary undertaking that the information he obtains from the books will only be used for informing his clients, practically the 1300 people who approved of Mr. Norey's action, of the result of his examination, and on that no doubt they will be either satisfied with what has been done or take further proceedings in the matter. It appears to me that the action is well founded. If, however, some hundreds of persons combined, it would not be right to allow each one to employ a separate accountant. The declaration will be that the right of inspection given by the rules is not merely a personal one, but may in proper cases be exercised by an accountant appointed by the persons who are entitled to inspect. The defendants must pay the costs of the action.

Solicitor for plaintiffs : *H. W. Parker.*

Solicitors for defendants : *Griffith & Gardiner.*

F. E.

*In re* DAVIDSON.  
MINTY v. BOURNE.

[1907 D. 1555.]

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1908

June 24, 25.

*Charitable Bequest—Advancement of Religion—Uncertainty—Trust vested in Ecclesiastical Officer for time being—“Charitable religious or other objects in connection with the Roman Catholic Faith.”*

A residuary bequest in trust for the Roman Catholic Archbishop of Westminster for the time being, to be distributed by him between such charitable, religious, or other societies, institutions, persons, or objects in connection with the Roman Catholic faith in England as he shall in his absolute discretion think fit:—

*Held* not a good charitable bequest, but void for uncertainty.

APPEAL from a decision of Swinfen Eady J.

Henry Davidson by his will, dated July 14, 1903, after making a bequest of his jewellery, furniture, and all other articles of personal, domestic, or household use or ornament, and his wines and consumable provisions, and giving two legacies of 100*l.* each to his executors, devised and bequeathed his residuary personal estate and his real estate upon trust for sale and conversion and for payment thereof of his funeral and testamentary expenses and the legacies thereinbefore bequeathed, and, subject thereto, upon trust to pay certain charitable legacies, including a legacy of 4000*l.* to the Roman Catholic Archbishop of Westminster for the time being, to be expended in such manner as he might think proper upon the altar or the ornaments of the same or round about the altar in the chapel of the Blessed Virgin Mary in the Roman Catholic Cathedral then in course of erection at Westminster; and he directed his trustees to hold the residue of his real and personal estate and the proceeds thereof “In trust for the said Roman Catholic Archbishop of Westminster for the time being to be distributed and given by him at his absolute discretion between such charitable religious or other societies institutions persons or objects in connection with the Roman Catholic faith in England as he shall in his absolute discretion think fit.” The testator died on February 27, 1907.

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The executors and trustees of the will took out an originating summons against the Roman Catholic Archbishop and the next of kin of the testator to determine whether the residuary gift was a good charitable bequest or was void for uncertainty.

Swinfen Eady J. held that the gift was void for uncertainty. The Archbishop of Westminster appealed.

*Younger, K.C.*, and *Hartree*, for the appellant. The fact that the trust is to be carried out by the Roman Catholic Archbishop of Westminster for the time being, coupled with the fact that the objects of the trust are all to be in connection with the Roman Catholic faith, shews an overriding intention on the part of the testator that the money should be devoted to charity within the definition given by Lord Macnaghten in *Commissioners for Special Purposes of Income Tax v. Pemsel*. (1) The gift is not to the person, but to the office, and it is really a gift for the endowment of the Roman Catholic faith: *In re Delany* (2); *Donnellan v. O'Neill* (3); *In re Garrard* (4); *Townsend v. Carus* (5); *Thorner v. Wilson* (6); *Da Costa v. De Pas* (7); *Cocks v. Manners*. (8)

No doubt the generality of the objects creates a difficulty, but where a charitable bequest is capable of two constructions, one of which would make it void and the other of which would render it effectual, the Court will adopt the latter: *Bruce v. Presbytery of Deer*. (9)

[COZENS-HARDY M.R. referred to *Morice v. Bishop of Durham*. (10)]

FARWELL L.J. referred to *Hunter v. Attorney-General*. (11)]

Assuming that there is no overriding charitable intention, but merely an intention to devote to religious uses which may or may not be charitable, the Court, in the exercise of its control over trusts of this kind, limits the application of the money to

(1) [1891] A. C. 531, 583.

(7) (1754) Amb. 228.

(2) [1902] 2 Ch. 642.

(8) (1871) L. R. 12 Eq. 574.

(3) (1870) L. R. 5 Eq. 523.

(9) (1867) L. R. 1 H. L. Sc. 96.

(4) [1907] 1 Ch. 382.

(10) (1804) 9 Ves. 399; (1805) 10

(5) (1844) 3 Hare, 257.

Ves. 522.

(6) (1855) 3 Drew. 245; (1858) 4

(11) [1899] A. C. 309.

Drew. 350.



charitable religious objects: *In re White* (1); *In re Garrard*. (2) [They also referred to and distinguished *In re Sidney* (3) and *In re Freeman*. (4)]

*Astbury, K.C.*, and *Underhill*, for the respondents, were not called upon.

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COZENS-HARDY M.R. This is an appeal from a decision of Swinfen Eady J., who has held that the gift of residue contained in the will of the testator is void for uncertainty. In my opinion it is impossible for us to differ from his decision. The will has the merit of brevity, and it is only necessary for the present purpose to refer to two clauses. First of all there is a gift to the Roman Catholic Archbishop of Westminster for the time being which is admittedly charitable; no question arises as to that. Then there is a gift of residue "in trust for the said Roman Catholic Archbishop of Westminster for the time being"—pausing there, that means the Archbishop at the time of the testator's death—"to be distributed and given by him at his absolute discretion between such charitable religious or other societies institutions persons or objects in connection with the Roman Catholic faith in England as he shall in his absolute discretion think fit." Stress has been laid—particularly by Mr. Hartree in his very able argument—upon the fact that the Roman Catholic Archbishop is the trustee who is to distribute this fund, and it is said that that fact alone is sufficient to shew that the whole purpose is charitable. I am unable to accept that view. I do not doubt that, if you find in a will words indicating that a distribution is to be made by persons in succession as holders of a particular religious or charitable office, that goes far to establish—and, it may be, goes sufficiently far to establish—the fact that the whole gift is charitable. But the mere fact that the trustee is a person holding a religious office, or is the head of a charitable institution or even an incorporated charitable institution, is not in any way sufficient to enable the Court to hold that all the trusts and purposes are charitable in the view of the law. I therefore do not think that

(1) [1893] 2 Ch. 41.

(3) [1908] 1 Ch. 488.

(2) [1907] 1 Ch. 382.

(4) [1908] 1 Ch. 720.

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it is sufficient for the appellant's argument to say that the Roman Catholic Archbishop of Westminster is the trustee. The decision of Farwell J. in *In re Delany* (1), which was relied upon on behalf of the appellant, so far from being an authority in support of that proposition, seems to me, when carefully considered, to be an authority in the contrary sense.

But then it is said that the objects in whose favour the Roman Catholic Archbishop is directed to distribute this residue are objects in connection with the Roman Catholic faith in England, and we are asked to hold that that is an overriding intent which ought to have effect so given to it as to modify the natural meaning of the prior words and induce us to construe them in a sense more restricted and narrow than we otherwise should. In the first place I do not think that the words "in connection with the Roman Catholic faith" mean anything else than in connection with the Roman Catholic Church, the Roman Catholic body, the Roman Catholic denomination, or whatever collocation of words you might use. But then it is said that if you find in the gift the words "the Roman Catholic faith" you must assume that all the other words are to be so read as that if they are connected with the Roman Catholic faith they must also be charitable. It is not without regret, if I may say so, that I do not feel able to assent to that view, because in the language of this will there is an express direction that the residue may be distributed at the trustee's absolute discretion "between such charitable religious or other societies institutions persons or objects in connection with the Roman Catholic faith in England as he shall in his absolute discretion think fit." In the face of those words it does seem to me impossible to say that it is not competent to the trustee, according to the express terms of this will, to apply the residue to societies, institutions, persons, or objects which are neither charitable nor religious. If that is so, there is an end of the case.

I think that we are dealing here with what is very old and very well established law. The leading authority which is cited in all these cases is *Morice v. Bishop of Durham*. (2) That has

(1) [1902] 2 Ch. 642.

(2) 9 Ves. 399; 10 Ves. 522.

been upheld in the House of Lords in *Hunter v. Attorney-General*. (1) I will read one passage only from the judgment of Lord Davey (2): "As Sir William Grant says in *Morice v. Bishop of Durham* (3): 'The question is not whether the trustee may not apply it upon purposes strictly charitable, but whether he is bound so to apply it?'" Then Lord Davey proceeds: "The answer to that question in the present case can only be that there is no such obligation. On the other hand, the other purposes to which conceivably the trustees may apply the whole fund in their discretion are not described with sufficient definiteness for the Court to attach any trust upon them." In the present case the testator has created a trust, but has not indicated any body of beneficiaries, any cestuis que trust, who can invoke the aid of the Court and prevent the trustee from doing that which some trustees might do if there were no Court to call them in question, namely, put the money in their own pockets. Of course I do not suggest for a moment that the Archbishop would do that. But one cannot have regard to the circumstances of the particular individual. The law is perfectly well established that the Court cannot recognize a trust which is so uncertain that there is no known means by which the trustee can be compelled to distribute that fund. For these reasons I think that the judgment of Swinfen Eady J. is correct and that this appeal must be dismissed.

FARWELL L.J. I agree. As Lord Halsbury says in the case of *Hunter v. Attorney-General* (4), "It is undoubtedly the law that, where a bequest is made for charitable purposes and also for an indefinite purpose not charitable and no apportionment is made by the will, so that the whole might be applied for either purpose, the whole bequest is void." That has been settled for a long time, and on the face of this will it seems to me that the words come exactly within it. The purposes are specified as "charitable religious or other." It is quite plain that, notwithstanding the addition of the words "in connection with the Roman Catholic faith," there may be purposes open to

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(1) [1899] A. C. 309.

(3) 9 Ves. 399, 406; 10 Ves. 522.

(2) Ibid. 324.

(4) [1899] A. C. 315.

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Farwell L.J.

the Archbishop which are not charitable within the definition which has been judicially put upon the word.

Let me illustrate my meaning by referring to the distinction drawn by Wickens V.-C. in *Cocks v. Manners* (1), where he held a gift to the Sisters of Charity of St. Paul at Selley Oak to be charitable and distinguished it from another gift in the same will to a Dominican convent which he held to be not charitable "on the ground," as I stated in my judgment in *In re Delany* (2), "that the sole purpose of the latter was to sanctify their own souls by prayer and contemplation without engaging in any corporal works of mercy. The Vice-Chancellor pointed out"—I am still quoting from my own judgment—"that religious services can only be charitable so far as they tend towards the edification or instruction of the public, and he held that the gift referred to above was not charitable." Now it is plain to my mind that the Archbishop might apply this fund or part of it to some convent or community on a footing exactly similar to that which was held by the Vice-Chancellor in *Cocks v. Manners* (1) not to be charitable.

It was argued by Mr. Hartree that, inasmuch as the gift is to the Roman Catholic Archbishop of Westminster for the time being, that involved a gift not to an individual but to an office, an office which was a religious office, and therefore it was *prima facie* charitable. In support of that argument he cited *In re Garrard* (3), before Joyce J., and *In re White* (4), before the Court of Appeal. But to my mind the argument fails in its initial stage, because the gift is not to the Archbishop for the time being for the religious purposes of his archbishopric, but it is for what is actually specified immediately afterwards, namely, for distribution "between such charitable religious or other societies institutions persons or objects in connection with the Roman Catholic faith in England as he shall in his absolute discretion think fit." It appears to me that when the testator has himself distinguished between charitable and religious societies it is impossible for this Court to say that by religious societies he means only such as are charitable and does not mean to extend the

(1) L. R. 12 Eq. 574.

(2) [1902] 2 Ch. 642, 648.

(3) [1907] 1 Ch. 382.

(4) [1893] 2 Ch. 41.



gift to the wider area which would include the convent I have just mentioned. Joyce J. in *In re Garrard* (1), in my judgment, really proceeds on the same basis, namely, that the gift to the vicar and churchwardens for the time being of a parish "to be applied by them in such manner as they shall in their sole discretion think fit" was a charitable gift for the benefit of the parish for ecclesiastical purposes. He felt himself able under that will to cut down the generality of the expression in the gift to the form which would be appropriate to a gift for the benefit of the parish for ecclesiastical purposes. Whether that case was rightly or wrongly decided, that was the basis of the decision. To my mind that does not touch a case like the present, where, as I say, the first step towards the argument does not arise at all. The case of *Thorner v. Wilson* (2) before Kindersley V.-C. really depended on similar considerations, but turned very much on the peculiar provisions of the will. The will there contained three separate devises and then a gift of residue, which the Vice-Chancellor construed, treating the will as a whole, by reference to one of the other gifts. I therefore think that this appeal fails.

KENNEDY L.J. I am of the same opinion and have nothing to add to the judgments which have been given by the other members of the Court.

Solicitors: *Witham, Roskell, Munster & Weld; Adam Burn & Son.*

(1) [1907] 1 Ch. 382.

(2) 3 Drew. 245; 4 Drew. 350.

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Feb. 15.

*In re J.* (A PERSON OF UNSOUND MIND NOT SO FOUND BY  
INQUISITION).

*Criminal Lunatic—Necessaries—Past Maintenance—Implied Obligation—Debt  
—Claim by Crown for Arrears—Criminal Lunatics Act, 1884 (47 & 48  
Vict. c. 64) s. 10, sub-s. 1, 3—Lunatic Asylums Act, 1853 (16 & 17 Vict.  
c. 97), s. 104.*

Under the Criminal Lunatics Act, 1884, s. 10, sub-s. 3, which incorporates by reference the language of s. 104 of the Lunatic Asylums Act, 1853, the cost of the maintenance of a criminal lunatic can be recovered by the Crown against property to which the lunatic has become entitled, as being due under an implied obligation to pay for that maintenance as a necessary; and this is a statutory liability for the whole amount expended in respect of which there is no limitation against the Crown.

THIS was an application by the receiver of the estate of a person of unsound mind not so found by inquisition for liberty to comply with the demands of the Treasury for the past maintenance of the lunatic under the following circumstances.

In November, 1880, the above-named "J." was convicted of wounding with intent to murder, and was ordered to be detained as a criminal lunatic at the Broadmoor Criminal Lunatic Asylum. The lunatic had been detained accordingly in Broadmoor Asylum from December 17, 1880, to the present date.

In the year 1906 the lunatic became entitled, on the death of his mother, to an income of 1300*l.* a year, and a receiver of his estate had been appointed under s. 116 of the Lunacy Act, 1890.

In October, 1908, a claim was made by the direction of the Home Office against the estate of the lunatic for maintenance at the rate of 2*s.* 6*d.* a day for the whole of the period during which he had been detained at Broadmoor to the date of the application.

Broadmoor Criminal Lunatic Asylum was established under the Criminal Lunatic Asylums Act, 1860 (23 & 24 Vict. c. 75), and by this Act the liability for the cost of the lunatic's maintenance was thrown, in the first instance, upon the lunatic's place of settlement.

By the Criminal Lunatics Act, 1884 (47 & 48 Vict. c. 64), s. 10, sub-s. 1, the expenses of maintenance of criminal lunatics are to "be defrayed out of moneys provided by Parliament," and by sub-s. 3 it is provided that s. 104 of the Lunatic Asylums Act, 1853, with respect to the application of a lunatic's property for his maintenance, with its ancillary sections, "shall extend to a criminal lunatic wherever he may be detained, and to his property, in like manner as if the said sections were herein re-enacted and in terms made applicable thereto."

The Lunatic Asylums Act, 1853, was repealed by the Lunacy Act, 1890, but s. 104 is in effect reproduced in s. 299 of the 1890 Act.

*Younger, K.C.*, and *W. H. Cozens-Hardy*, for the receiver. The lunatic's property is more than sufficient for the requirements of himself and his family, and on the authority of *In re Newbegin's Estate* (1) and other cases it is admitted that six years' arrears from this date can be recovered, but the question is whether the Crown is entitled to claim for arrears for the whole time that the lunatic has been detained.

[*C. H. Sargant*, for the Crown, stated that it had now been ascertained that the guardians of the lunatic's place of settlement had paid for his maintenance up to October 31, 1884, when the Criminal Lunatics Act, 1884, came into operation, and consequently that arrears were only claimed from November 1, 1884.]

It would seem from *In re Weaver* (2) to be questionable whether an action can be maintained against a lunatic for necessities on the ground of an implied contract, and in *In re Rhodes* (3) the liability is treated more as an implied obligation than as a contract; and the question is, can this implied obligation be treated as being a debt, and a Crown debt?

[*Sargant* referred to *In re Harris*. (4)]

It is difficult to see how there can be an implied contract with a lunatic if he is incompetent to make an express contract. In *In re Clabbon* (5) this liability is treated as on the same footing

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(1) (1887) 36 Ch. D. 477.

(3) (1890) 44 Ch. D. 94.

(2) (1882) 21 Ch. D. 615.

(4) (1880) 49 L. J. (Ch.) 327.

(5) [1904] 2 Ch. 465.

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as that of an infant who cannot contract for necessities, though he may be under an obligation to pay. In this state of the authorities the receiver did not feel justified in making this payment without the direction of the Lords Justices.

*C. H. Sargant*, for the Crown, was not called upon.

COZENS-HARDY M.R. In this case it is not necessary to consider very minutely what are the precise limits of the liability of a lunatic in respect of his maintenance—in other words, to use for a moment language which is more appropriate to infants, what is the lunatic's liability for necessities. But there is a series of authorities, going back to *Howard v. Earl Digby* (1), in the House of Lords, and coming down to the case of *Brockwell v. Bullock* (2), where Lord Esher M.R. distinctly says that an action may be maintained if the articles are “necessary,” and then coming down again to *In re Rhodes* (3) and the case of *West Ham Union v. Pearson* (4), where Fry L.J., sitting in a Divisional Court, says there is a common law liability to repay the expenses necessarily incurred for the benefit of the lunatic. Whether that liability is a liability on an implied contract or not, it is a liability which the law recognizes on the part of a lunatic or the lunatic's estate. It is a liability to whom? It is a liability to the person who has supplied the necessities. In the present case that undoubtedly is a liability to the Crown, because the effect of the Criminal Lunatics Act, 1884, is to incorporate s. 104 of the Lunatic Asylums Act, 1853, which incorporation remains perfectly good and valid notwithstanding the repeal of that Act by the Lunacy Act, 1890. Where the Crown seeks to enforce a legal liability, it is quite plain that the Statute of Limitations has no operation; the Crown is not bound by that statute, and the Crown is entitled to recover the amount claimed here, having regard to the admission of Mr. Younger, that if there was any liability, the magnitude of the lunatic's estate would enable the Court to enforce that liability. In my opinion the claim ought to be allowed, and the receiver ought to be at liberty to pay the full amount

(1) (1834) 2 Cl. & F. 634, 661.

(3) 44 Ch. D. 94.

(2) (1889) 22 Q. B. D. 567.

(4) (1890) 62 L. T. 638; 54 J. P. 645.



now claimed from November, 1884, for sums expended by the Crown for the maintenance of this lunatic.

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OF UNSOUND  
MIND),  
*In re.*

FLETCHER MOULTON L.J. In my opinion the position of a lunatic and that of an infant with regard to necessities are precisely the same. Both come under the principle laid down authoritatively by the Court of Appeal in the case of *In re Rhodes* (1), which is well expressed in the head-note in the following words: "Whenever necessities are supplied to a person who by reason of disability cannot himself contract, the law implies an obligation on the part of such person to pay for such necessities out of his own property." Now, if I may respectfully say so, I quite agree with the Lords Justices who decided that case, that the obligation is not properly a contractual obligation; it is an obligation implied by law from the fact that necessities have been supplied to a person who is unable to contract, but it is none the less an obligation and it has exactly the same status as a debt; it is recoverable under the same circumstances that a debt would be, and the power of recovering it is limited precisely in the same way by the same Statute of Limitations.

When we examine the exact claim in this case, it is admitted that it is under s. 10 of the Criminal Lunatics Act, 1884, and sub-s. 3 of that section says that the provisions which previously applied to guardians and local authorities and are expressed in s. 104 of the Lunatic Asylums Act, 1853, shall apply to the money expended by the Crown on the support of lunatics in criminal lunatic asylums. The language of s. 104 of the 1853 Act is not incorporated in any way which would make s. 10 of the Act of 1884 affected by any subsequent repeal of the Act of 1853. It is incorporated as language. The consequence is that the repeal of the Act of 1853 has no effect on this case. If then we read the language of those provisions into sub-s. 3 of s. 10 of the Act of 1884, it is clear that the cost of the maintenance of a criminal lunatic can be recovered by the Crown, as being due under an implied obligation of the lunatic to pay for that maintenance as a necessary. When we have arrived at that point no question of the Statute of Limitations can arise.

(1) 44 Ch. D. 94

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It is an obligation to the Crown which the Crown can enforce as plaintiff; hence the amount which can be recovered is not limited to six years, but is the whole amount which has been expended. I am therefore of the same opinion as the Master of the Rolls.

BUCKLEY L.J. In my opinion the estate of the lunatic is liable to the cost of maintenance back to the year 1884. The material considerations which lead me to that conclusion are simply two—first, that the Crown is the person claiming; therefore there is no Statute of Limitations which applies; and, secondly, that the effect of s. 10, sub-s. 3, of the Act of 1884, introducing by reference s. 104 of the Act of 1853, is to create a statutory liability in the lunatic's estate for certain matters, including this; therefore it is a statutory liability in respect of which there is no limitation against the Crown, and therefore the Crown is entitled.

Solicitors : *Robbins, Billing & Co.*; *Treasury Solicitor.*

W. C. D.

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## EBBERN v. FOWLER.

[1907 E. 742.]

*Settlement — Construction — Illegitimate Children — Class Gift — After-born Children — Child en ventre sa mère at Date of Settlement.*

By a post-nuptial settlement a fund belonging to the wife was settled as to one third upon trust to pay the income to her daughter E., therein described as the wife of J. K., for life, for her separate use, independently of J. K. or any future husband, and after her death in trust for the children of E. who being sons should attain twenty-one or being daughters should attain that age or marry in equal shares.

A year before the settlement E. went through the ceremony of marriage with J. K., who had been her deceased sister's husband, and at the date of the settlement she was enceinte with a child, who was born a month afterwards and attained twenty-one, and she died without ever having been lawfully married:—

*Held*, that the child was entitled to participate under the settlement.

*In re Shaw*, [1894] 2 Ch. 573, overruled as being inconsistent with *Hill v. Crook*, (1873) L. R. 6 H. L. 265, and *Crook v. Hill*, (1876) 3 Ch. D. 773.

By an indenture of settlement dated July 1, 1879, and made between Thomas Ebbern and Emma Matilda Ebbern, his wife, of

the one part, and the said Emma Matilda Ebbern, Rosetta Ebbern, and the defendants James George Washington Fowler and Mary Ann Fowler, his wife, of the other part, after reciting that a sum of 3300*l.* reduced Three per cent. Bank Annuities to which the said Emma Matilda Ebbern was entitled had with the consent of her husband been transferred into the names of the said Emma Matilda Ebbern, Rosetta Ebbern, James George Washington Fowler, and Mary Ann Fowler, it was agreed and declared that the said last-mentioned parties should stand possessed of the said sum and the securities for the time being representing the same upon certain trusts for the benefit of the said Emma Matilda Ebbern and Thomas Ebbern during their respective lives, and after the failure or determination of those trusts as to one equal third part upon trust to pay the dividends to the "said Rosetta Ebbern (daughter of the said Emma Matilda Ebbern)" during her life for her separate use without power of anticipation, and after her death to any husband she might marry during his life or until bankruptcy if she should so appoint by will, and subject as aforesaid in trust for her children who being sons should attain the age of twenty-one years or being daughters should attain that age or marry in equal shares; and as to one other equal third part upon similar trusts for the benefit of "the said Mary Ann Fowler (daughter of the said Emma Matilda Ebbern)" and her present or any future husband whom she might marry and her children; and as to the remaining equal third part upon trust to pay the dividends "unto Elizabeth Kinder (daughter of the said Emma Matilda Ebbern and wife of John Kinder) during her life for her sole and separate use independently of the said John Kinder or any future husband whom she may marry and free from the control debts and engagements of the said John Kinder or any such husband and so that she shall not have power to deprive herself thereof in anticipation and her receipts alone shall (notwithstanding coverture) be good and effectual discharges for the same And after the death of the said Elizabeth Kinder as to her said one equal third part or share of and in the said Bank annuities money stocks funds and securities In trust for the child (if only one) or for the children (if more than one) of the

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said Elizabeth Kinder who being a son or sons shall attain the age of twenty-one years or being a daughter or daughters shall attain that age or marry to be divided between them (if more than one) in equal shares." The settlement further provided that in the event of the death of any of the daughters without leaving any child who should live to attain a vested interest in the trust premises the share of any such daughter as well original as accruing should be held in trust for the other daughters and their children in the same manner as the original shares. And the settlement then provided as follows: "And it is hereby declared that Francis Ebbern the son of the said Elizabeth Kinder born before her marriage with the said John Kinder shall for the purpose of taking an interest under the trusts hereinbefore declared be considered as the legitimate child of the said Elizabeth Kinder."

Rosetta Ebbern married one William Fitt and died on November 23, 1887, intestate and without issue.

At the date of the settlement Elizabeth Ebbern, otherwise Kinder, had for some time been cohabiting with John Kinder, who had been the husband of a deceased sister of Elizabeth, and on October 31, 1878, she went through the ceremony of marriage with him and thereafter lived with him as his wife until his death in 1887. She had issue by the said John Kinder the said Francis Ebbern, who died under the age of twenty-one years, the plaintiff John Thomas Ebbern (otherwise Kinder), who was born three weeks after the execution of the settlement, namely, on July 23, 1879, and one other son, Gilbert Ebbern (otherwise Kinder), who was born in September, 1886, and died under the age of twenty-one years; and she died in 1903, without ever having been lawfully married.

Emma Matilda Ebbern survived her husband and, after marrying again, died on April 28, 1907.

This action was brought for a declaration that upon the true construction of the settlement and in the events which had happened the plaintiff was entitled to a moiety of the trust premises.

The defendants to the action were Mr. and Mrs. Fowler (who were interested in the settlement both as trustees and beneficiaries) and their children, some of whom were infants, and the remaining trustee of the settlement.



The action came on for hearing before Joyce J. on July 31, 1908.

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*Hughes, K.C.*, and *J. E. Harman*, for the plaintiff. In the settlement Elizabeth Kinder is expressly referred to as the wife of John Kinder; therefore the term "children" must be taken to include her children by him: *Hill v. Crook* (1); *Occleston v. Fullalove*. (2) There is nothing on the grounds of public policy to preclude the plaintiff, who was en ventre sa mère at the date of the settlement, from taking: *Crook v. Hill*. (3) There is no distinction as to this between a will and a settlement: Norton on Interpretation of Deeds, p. 420. The question arose under a settlement in *Gabb v. Prendergast* (4), but that case is not very clearly in point. It is true that in *In re Shaw* (5), where a settlement was made providing for the children of B. by A., who were persons who could not lawfully marry, North J. held that a child of B. by A. who was en ventre sa mère at the date of the settlement took no benefit under it; but, if necessary, we submit that that decision was contrary to *Crook v. Hill* (3) and *Occleston v. Fullalove*. (2) The provision here is for the children of Elizabeth Kinder. It is not a question of reputation, therefore, but of maternity.

*C. Church*, for the adult children of Mr. and Mrs. Fowler. The plaintiff cannot take under the settlement. Presumably the settlor knew that her daughter was enceinte at the date of the settlement, and the plaintiff is not specifically described. The settlor must be taken to have contemplated the legitimate children of a future lawful marriage of her daughter: *In re Shaw*. (5)

*A. M. W. Wells*, for the infant children of Mr. and Mrs. Fowler.

*H. E. Wright*, for the trustees of the settlement.

*Hughes, K.C.*, in reply. The difficulty of identification does not arise where, as here, the provision is for the children of a particular woman: *Occleston v. Fullalove*. (6) "Children" in this settlement includes the issue of what is described as a marriage between Elizabeth and John Kinder. In *In re Shaw* (5)

(1) L. R. 6 H. L. 265, 283.

(2) (1874) L. R. 9 Ch. 147.

(3) 3 Ch. D. 773.

(4) (1855) 1 K. & J. 439.

(5) [1894] 2 Ch. 573.

(6) L. R. 9 Ch. 164.

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North J. went into the question of reputation, but that does not arise here, the provision being merely for the children of Elizabeth Kinder. [*In re Du Bochet* (1) was also referred to.]

*Cur. adv. vult.*

1908. Oct. 20. JOYCE J. On July 1, 1879, Mrs. Ebberrn being entitled to a sum of about 3000*l.* stock, Mr. and Mrs. Ebberrn made a settlement of this stock, upon trusts under which, after their own lives, it was to be divided into three parts, one for each of their three daughters, who were named, the trusts of each share being for the daughter for life with a power to appoint an interest to the surviving husband and then for the children of the daughter in equal shares. Under these limitations, of course, legitimate children only could take without some special provision enabling illegitimate children to be admitted. Now the facts were that one daughter, Elizabeth, had gone through the ceremony of marriage with John Kinder, the husband of a deceased sister. Previous to this she had an illegitimate son, Francis, of which John Kinder was reputed to be the father, and at the date of the settlement she was enceinte of another child, John Thomas, the present plaintiff, who was born in the same month of July, 1879. In this settlement there are some special words with reference to this daughter Elizabeth. For instance, she is spoken of as being the wife of John Kinder, and the settlement might have gone further and words might have been inserted which would have been effectual to admit any child of Elizabeth who was *en ventre sa mère* at the date of the settlement. There is no such clause, but we do find a clause or words directing that Francis, the illegitimate son who was born before Elizabeth went through the ceremony of marriage with John Kinder, should for the purpose of taking any interest in the settlement be considered as a legitimate child of Elizabeth Kinder, and the question now arises whether the plaintiff, the child who was *en ventre sa mère* at the date of the settlement, can be admitted, under the circumstances, to take as a child under this settlement. Unfortunately, there is not in this settlement anything amounting to a provision that all existing illegitimate children, or children whether born

(1) [1901] 2 Ch. 441.

in wedlock or not, of Elizabeth are to take. I say "existing" because such a provision could only have been valid with reference to existing children. If it had been in general terms, it could not have been valid in reference to future-born children, and under this settlement it is only the offspring of the relation or the connection, or whatever it may be called, between Elizabeth and John Kinder that are qualified to take. No child who was illegitimate is qualified to take unless it be a child or reputed child of John Kinder. Now, when a lady lawfully married has issue, the child is presumed to be the child of the husband and is legitimate, and it may well be argued that when we find such words as we do find in this settlement it was intended that a similar presumption should be applied to the case of the daughter Elizabeth and John Kinder; in other words, that any child born of Elizabeth during the continuance of her relations with John Kinder should be presumed to be the child of John Kinder. Further than that the plaintiff John Thomas was in existence at the date of the settlement. He was reputed to be the child of John Kinder before the time arrived for the limitations in the settlement in favour of children to take effect. He was, in fact, reputed to be the child of John Kinder from the date of his birth, and, being in existence, there is no rule of public policy to prevent his taking under this limitation if the words had been apt to include him. In the case of *In re Shaw* (1), before North J., it was held by that learned and most careful judge that under a trust in a settlement for the issue of the marriage of William Shaw and Emma his wife, there being no valid marriage between them and the trust being a trust for the issue of the marriage, a child of Emma en ventre sa mère at the date of the settlement could not take. His reasons for that conclusion are given in the judgment. With reluctance I come to the conclusion that I cannot consistently with that decision of North J. hold that the plaintiff in the present case is entitled to take. That decision, as far as I know, has never been questioned, certainly has not been overruled, and if it is to be overruled it must be overruled by the Court of Appeal. In other words, I am compelled to come to the conclusion

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that the plaintiff cannot take unless he was at the date of the settlement either an actual or reputed child of John Kinder. As to whether he was an actual child of John Kinder the Court will not inquire; that he was a reputed child of John Kinder I cannot hold consistently with the decision in *In re Shaw*. (1) Consequently this action must be dismissed.

G. A. S.

C. A. The plaintiff appealed. The appeal was heard on March 11, 1909.

*Hughes, K.C.* (with him *J. E. Harman*), for the plaintiff. The settlement itself recognizes the marriage of Elizabeth and John Kinder as legal, and that is sufficient to shew that the children of the marriage are to be regarded as legitimate. For the purpose of taking a benefit under a settlement a child en ventre sa mère is treated in law as actually in existence, and as the child was conceived before the date of the settlement, no question of public policy arises. Where the instrument clearly indicates that illegitimate children are to be included as children, a gift to children, although a class gift, is good as to any members of the class who are not debarred from taking by public policy. No doubt the intention of the settlor was to include all children, whether existing or not, but then the law steps in and prevents the after-born children from taking: *Crook v. Hill* (2); *Occleston v. Fullalove*. (3) Those were cases of wills, but for the present purpose there is no difference between a will and a deed beyond the fact that a deed operates from its execution and a will from the death of the testator: *Occleston v. Fullalove*, per Mellish L.J. (4) Joyce J. acted upon *In re Shaw* (1) contrary to his own opinion, but *In re Shaw* (1) is contrary to the principle of the cases above cited and ought to be overruled.

*C. Church*, for the adult children of Mr. and Mrs. Fowler. The Court is accustomed to construe deeds more strictly than

(1) [1894] 2 Ch. 573.

same case on further consideration,

(2) (1871) L. R. 6 Ch. 311, affirmed  
by the House of Lords sub nom. *Hill*  
*v. Crook*, L. R. 6 H. L. 265; and the

3 Ch. D. 773.

(3) L. R. 9 Ch. 147.

(4) Ibid. 173.



wills. If *Hill v. Crook* (1) applies to deeds it covers this case, unless the proviso in favour of Francis takes it out of the principle of that decision. The proviso by expressly declaring that Francis is to be regarded as legitimate shews that the intention of the settlor was not to benefit illegitimate children generally.

*H. E. Wright*, for the trustees and the infant children of Mr. and Mrs. Fowler.

*Hughes, K.C.*, in reply.

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COZENS-HARDY M.R. This in form is an appeal from a decision of Joyce J., but I think it is more accurate to say that in substance it is an appeal from the decision of North J. in *In re Shaw* (2), which Joyce J. thought himself bound to follow, leaving the Court of Appeal to deal with that case as it might think fit. The point here arises upon a deed and not upon a will, and the point is whether a child born a month after the execution of the deed but a child of a woman who had gone through the ceremony of marriage with a person who had been her deceased sister's husband can take under the limitations which I am about to read. I have said that this is a deed and not a will. I can see no ground for drawing any distinction between a deed and a will for the purposes of the present case or cases of this class, although undoubtedly in many other cases and in many other circumstances such a distinction must be drawn. The settlement was made by the grandmother. She had three daughters, one of whom was Elizabeth. She settled this fund on herself and her husband for their respective lives, and then it was to go in thirds. One third was given to her daughter Rosetta, another to a married daughter, Mary Ann Fowler, and her children, and the remaining third was given in these terms. [His Lordship read the trust in favour of Elizabeth and her children.] Now John Kinder was a person with whom Elizabeth could not have contracted a valid marriage, although in truth she had gone through the ceremony of marriage with him in October, 1878, the year before the settlement was executed. On the face of this deed I think it is apparent that the grandmother must have known that John Kinder had been married before to another

(1) L. R. 6 H. L. 265.

(2) [1894] 2 Ch. 573.

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daughter who was dead and that subsequently Elizabeth had gone through the ceremony of marriage with him. Notwithstanding that, she deliberately describes Elizabeth as the wife of John Kinder. She gives Elizabeth the beneficial interest for her separate use, which of course presupposes a marriage, "independently of the said John Kinder or any future husband and free from the control debts and engagements of the said John Kinder and any such husband." She therefore treats Elizabeth as married, she treats John Kinder as her husband, and ultimately she gives the fund in trust for "the children of the said Elizabeth Kinder" as therein mentioned. Under these circumstances and apart from the proviso which I shall come to afterwards, is it possible to distinguish this case from the principles emphatically laid down by the House of Lords in *Hill v. Crook* (1) and given full and consequential effect to by Hall V.-C. in a subsequent stage of the same case, *Crook v. Hill*? (2). To my mind it is apparent on the face of this deed that the intention was to treat the children of Elizabeth, whether by John Kinder or not, as persons entitled to benefit under this trust, and, that being so, it appears to me that the present appellant, who in the events which happened was begotten before the settlement but was not born until three weeks after the settlement, was in law a person in esse who was entitled to take. I think it is impossible consistently with the decision of the House of Lords to hold that this child was not entitled to the benefits of this trust, and in my opinion he ought to stand on the same footing as a child actually born at the date of the settlement. But then it is said that, even assuming that that is the consequence of the earlier part of this deed, a different result ought to be arrived at when you come to the proviso. I ought to say that before the ceremony of marriage was gone through there was a child, Francis. That child, assuming that this marriage ceremony was to be treated as constituting a valid marriage, was not legitimate on that hypothesis, and, therefore, it is quite consistent with the whole deed to declare, as was done by this proviso, that Francis Ebbern, the son of Elizabeth Kinder born before her marriage with John

(1) L. R. 6 H. L. 265.

(2) 3 Ch. D. 773.

Kinder, should for the purpose of taking an interest under the trusts of the settlement be considered as the legitimate child of the said Elizabeth Kinder. I think that means nothing more than this. If Francis had been born after the marriage ceremony he would have been undoubtedly within the meaning of the deed a child entitled to the benefit of the trusts, but having been born before the ceremony of marriage there would have been a serious question whether he would have come under those benefits, and this proviso was inserted to remove all doubt upon that point. There is nothing in any of the observations I have made upon the general purport and intent of the deed which conflicts with any of the authorities on this subject apart from the decision of North J. in *In re Shaw*.<sup>(1)</sup> That decision I must now shortly deal with. In 1843 William Shaw and his aunt by the half blood went through the ceremony of marriage, and in the following year they settled a fund “upon trust for the children or grandchildren or other issue of the said marriage of the said William Shaw and Emma his wife”—not of Emma alone, but of those two individuals who had gone through the ceremony of marriage—upon such terms as the mother should by deed appoint, and there was a gift over in default of appointment. There were ten children, one of whom was born a month after the deed, and therefore *en ventre sa mère* at the date of the deed, and nine others were born subsequently, and the question was not whether the whole ten could take, because the future illegitimate children certainly could not take, but whether this one could. The learned judge, after referring to the trusts of the settlement, says this <sup>(2)</sup>: “That is clearly intended as a provision for illegitimate children subsequently to be born to an extent that cannot wholly take effect; it was not the intention to give the whole to the first; but it is said that the legal effect was to give the whole to the first. I am of opinion that such is not the legal effect. No doubt there was a child then begotten in favour of whom a settlement might have been made if proper and apt words had been used; if the settlement had referred to a child already begotten and not born, for example, that might have been sufficient. I do not find any such words. I do not find a trace of anything indicating a

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(1) [1894] 2 Ch. 573.

(2) [1894] 2 Ch. 575.

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reference to that child otherwise than as one of a class. It is said that 'child' meant 'reputed child' and that the conduct of the parents was such that this child gained the reputation of her being their legitimate child. I do not think that is enough." In my opinion that is really inconsistent with the decision of the House of Lords in *Hill v. Crook*. (1)

In *Hill v. Crook* (1) the gift was to a class. It was a gift to such of the children of Mary Crook (who had gone through the ceremony of marriage with a man who had previously married her deceased sister) as she should appoint, and in default of appointment for her children who should attain twenty-one or being a daughter or daughters marry under that age. The House of Lords decided that the class was not wholly void and uncertain by reason that it might include some future illegitimate child who could not take, because they overruled a demurrer which Stuart V.-C. had allowed on the footing that the plaintiffs, who were two children born at the date of the testator's will, could not take. They held they could notwithstanding that there were some members of the class who might not be able to take. There were in fact two more children, one of whom was en ventre sa mère at the date of the will and at the date of the testator's death. The question whether that child could take was left open. That question came before Hall V.-C. upon further consideration. The Vice-Chancellor held that he was entitled to take, and it appears from the order on further consideration which has been produced to us that he declared that the two children born before the date of the will and the child en ventre sa mère at that date were all the persons entitled to take under the trusts of the will. He held further that a fourth child who was both born and begotten after the testator's death could not take on the ground of public policy. That is to say, although the class intended to be benefited consisted of four persons, one of whom could not take, yet the Court declared that the three members existing at the testator's death, treating the child en ventre sa mère as existing, could take and did take the whole. With great respect to North J., I think that the view which he took was not consistent with the principles laid down by the

(1) L. R. 6 H L. 265.



highest possible authority binding upon us and that his decision ought not to be followed. Therefore I think the judgment of Joyce J., which was contrary to his own opinion, cannot be supported, and that this appeal must be allowed.

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FLETCHER MOULTON L.J. I so entirely agree with the judgment of the Master of the Rolls that I do not wish to add a word upon the general question. But I propose to say a few words about the proviso. I cannot see in the proviso any intention to modify the meaning of the trusts previously declared in the deed. Its object is simply to add to the list of beneficiaries a person who unquestionably would not belong to the class to be benefited on either of the possible interpretations of the settlement. In doing this the draftsman has possibly been a little over-emphatic: i.e., he states that the son born before the ceremony of the marriage is to be considered as "the legitimate child" of Elizabeth. He might have said simply "the child" of Elizabeth. But the fact that the draftsman framed the clause in this way does not, I think, give any solid ground for deciding that the original trust which was intended primarily to benefit the offspring of this union between Elizabeth and John Kinder is applicable only to the legitimate children of a future marriage. In my opinion this case is governed by *Hill v. Crook*. (1)

BUCKLEY L.J. At the date of the settlement the settlor had three daughters. One was a spinster, the second was the wife of J. G. W. Fowler, the third had gone through the ceremony of marriage with John Kinder, who had been her deceased sister's husband. By the settlement the lady, subject to certain life interests, settles this fund upon her daughters in thirds. The first daughter she describes as "Rosetta (daughter of the said Emma Matilda Ebbern)." The second she describes in the same way as "Mary Ann Fowler (daughter of the said Emma Matilda Ebbern)." But the third, as to whom the question arises, she calls "Elizabeth Kinder (daughter of the said Emma Matilda Ebbern and wife of John Kinder)." She did not similarly describe Mrs. Fowler. That seems to me to be material. She then goes on to refer to John Kinder as the husband of

(1) L. R. 6 H. L. 265.

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Elizabeth, and she makes gifts to the children of Elizabeth Kinder. In that settlement so far I find a statement by the settlor which has reference to the family relationship between Elizabeth and John Kinder, the nature of which she must have known to be such as it was, and she treats it as a marriage. She emphatically calls her the wife of the man, she calls the man the husband of the lady, and she speaks of their children. As Lord Cairns said in *Hill v. Crook* (1), the terms "husband" and "wife," "father" and "mother" and "children," are all correlative terms. Therefore I am entitled to say that the settlor in this instrument is using such a dictionary as that "child" means the offspring of this union. Then I come to the proviso. I regard that proviso simply as meaning this. I am paraphrasing it in my own language. The settlor was saying "According to my dictionary this relation between John and Elizabeth Kinder although not a marriage is called a marriage. She is called the wife, he is called the husband, and the offspring are called children. Now I remember that there is another person, Francis, who cannot be covered by that description, because he was born before the two persons whom I have called husband and wife went through the marriage ceremony; so that that child is illegitimate even according to my use of the word 'marriage.' Therefore I am going to provide that though he is illegitimate according to this convention he shall for the purpose of taking an interest under this settlement be considered as a legitimate child." It appears to me that the effect of the proviso is simply to make that child born before the marriage ceremony legitimate for the purposes of the settlement in the same sense that the children born after the marriage ceremony were legitimate.

The only other point that occurred to me was this, that inasmuch as it is impossible legally to provide for future illegitimate children it might be said that this being a gift to a class cannot be supported because it includes or may include persons who cannot take. But having regard to *Crook v. Hill* (2) that cannot be argued for this reason. In *Crook v. Hill* (2) beyond the two living children and the third child en ventre sa mère there was a fourth child begotten and born after the death of the

(1) L. R. 6 H. L. 265.

(2) 3 Ch. D. 773.

testator. The House of Lords upheld the claims of the two, leaving the claim of the third child open, with knowledge of the fact that there was a fourth child who would have been within the class if the intention of the testator, which was to benefit all the children, was to be carried out. Subsequently exactly the same question arose before Hall V.-C. in a later stage of the case. The same facts were before him, and he then admitted the child who was *en ventre sa mère* and excluded the fourth child. That is to say, he affirmed the right of three members of the class to take notwithstanding that the class included persons who could not take. By the order on further consideration the Court declared "that the plaintiffs and the defendant Robert Crook are all of the persons intended to be denoted in the will by the words 'the children of my daughter Mary Crook' and entitled to take under that description the benefits conferred upon such children under or by virtue of the said will." It is therefore necessarily involved in the decision of the House of Lords that any such objection as that the class might include persons who could not take on the ground of public policy is not open. That being so, it appears to me impossible to decide this case otherwise than by reversing the decision of North J. in *In re Shaw*. (1) The basis of his judgment is to be found, I think, in the passage in which, speaking of the settlement, he says, "That is clearly intended as a provision for illegitimate children subsequently to be born to an extent that cannot wholly take effect; it was not the intention to give the whole to the first." In the view of the learned judge a settlement in favour of a class of illegitimate children which might include after-born children ought not to be allowed to take effect as a provision for the existing children because that was not the class intended by the settlor. But that is contrary to the view of the House of Lords. I think, therefore, that this appeal must be allowed.

Solicitors: *E. W. Reeves, for Sedgwick, Turner, Oddie & Sworder, Watford; Church, Adams & Prior, for Matthew Arnold, Watford; E. J. H. Carter.*

(1) [1894] 2 Ch. 573, 575.

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[1905 W. 1171.]

*Burial—Disused Burial Ground—Letting of unused and unconsecrated Land—Application of Rents—Parish—Vestry—Borough Council—Transfer of Powers and Property—Exception of Ecclesiastical Powers and Property—Costs—Burial Act, 1857 (20 & 21 Vict. c. 81), s. 24—London Government Act, 1899 (62 & 63 Vict. c. 14), ss. 4, 23.*

In 1757 the vestry of St. George, Hanover Square, bought land for the purpose of a burial ground, the purchase-money being provided out of ecclesiastical funds. By a private Act of Parliament this land was vested in the rector and churchwardens of the parish for the use of the inhabitants of the parish as a burial ground. The rector and his successors were to take the burial fees. Part of the land was consecrated in 1765 and 1818 and used as a burial ground and a site for a chapel; the rest remained unconsecrated. In 1767 and 1768 the rector and churchwardens, acting under the direction of the vestry, granted building leases for ninety-nine years of the unconsecrated land. The ground rents were received by the churchwardens and accounted for by them as part of the revenues of the church. In 1854 the burial ground was closed by an Order in Council pursuant to the Burial Act, 1852, and a burial board was constituted for the parish with a new burial ground. From 1854 to 1865 the ground rents were paid to the burial board. The building leases then fell in, and the rector and churchwardens, acting under the direction of the vestry, renewed the leases for twenty-one years at increased rents, and from that time the rents were collected by the vestry clerk, paid to the management account of the vestry, and applied as part of the ordinary revenues of the parish. In 1900 the buildings were pulled down and fresh building leases were granted. The council of the city of Westminster claimed to be entitled to administer the income of the property for the benefit of the parish.

By s. 24 of the Burial Act, 1857, power to let and sell the unconsecrated parts of disused burial grounds was given to the trustees thereof, and the net moneys received by them were to be applied in discharge of incumbrances, and the residue, where the land was held in trust for the parish, for the benefit of the parish as the vestry should direct.

By s. 4 of the London Government Act, 1899, the powers and property of vestries were transferred to borough councils, but by s. 23 powers relating to the affairs of the church and interests in church property were excepted:—

*Held* (Buckley L.J. dissenting), that s. 24 of the Burial Act, 1857, empowered the vestry to apply the net rents of the houses for the benefit



of the parish in any way they might think fit, whether secular or ecclesiastical, and that the power thereby conferred was not a power relating to the affairs of the church within the exception in the London Government Act, 1899, and consequently passed to the plaintiffs.

Decision of Warrington J. affirmed.

Costs of unsuccessful appellants allowed out of the trust estate in the special circumstances of the case.

#### APPEAL from a decision of Warrington J. (1)

The parish of St. George, Hanover Square, was constituted under the joint operation of three Acts of Parliament, 9 Anne, c. 22, 10 Anne, c. 11, and 6 Geo. 1, c. xxxii., the object of which was to provide for the building of fifty new churches in and about the metropolis. The affairs of St. George's were governed under those Acts by a select vestry constituted by an order of commissioners appointed by the Acts. The rector and churchwardens were members of the vestry, which was a co-optative body until it was rendered elective by the Metropolis Management Act, 1855. The rector was ex officio chairman until the chairman became elective under the provisions of the Local Government Act, 1894, and after that date he remained chairman until the abolition of the vestry by the London Government Act, 1899, he being elected chairman by the vestry.

In the year 1757 it became necessary for the parish to acquire some additional ground for the purpose of burials, and they purchased five acres of land forming part of the estate of the Bishop of London, in the parish of Paddington, subject to a lease for lives vested in a family of the name of Frederick; 600*l.* was paid to the tenant for life, and certain annual payments to other parties interested were charged on the property, the 600*l.* being provided out of ecclesiastical funds. In 1762 the vestry obtained a private Act of Parliament, 3 Geo. 3, c. 1, "for vesting certain parcels of land in Paddington, in the county of Middlesex, in the rector and churchwardens of the parish of St. George, Hanover Square, in the said county, and appropriating the same for a burial ground for the said parish." By that Act it was enacted that the said five-acre plot, and also a small adjoining strip of land, part of the waste of the manor of Paddington, abutting to the north upon the five acres and to the

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south upon the road now known as Bayswater Road, should be settled upon and vested in the rector and churchwardens of the parish of St. George for the time being and be deemed to be part of that parish, and be used, appropriated, and enjoyed by the inhabitants of the parish as and for a cemetery, and for ways and passages to and from the same for the use and benefit of the inhabitants for ever. The rector and churchwardens were to be liable for the annual payments. Nothing in the Act was to prejudice any of the rights or fees which the rector ought to have in the intended burial ground, but he and his successors and the churchwardens and other officers of the parish were to take the like funeral fees as had been taken for burials in the old cemetery. The vestry proceeded to build on part of the land a chapel, now known as the Oratory Chapel, in the Bayswater Road, and enclosed with a wall so much of the land as they intended to use as a burial ground. The expenses of the Act of Parliament and of building the chapel and wall were provided for out of ecclesiastical funds. In 1765 the vestry obtained the consecration of the enclosed part of the land, including the site of the chapel. In 1818 another portion of the burial ground premises, consisting of a strip of land co-extensive in width with the chapel and lying between it and the road, was also consecrated.

In 1767 and 1768 the rector and churchwardens, acting under the direction of the vestry, granted building leases for ninety-nine years of the unconsecrated portion of the land at rents amounting together to 30*l.* a year, and several houses were built thereon. The annual payments charged on the land amounted to 17*l.*, so that only the net sum of 13*l.* a year was available. These ground rents were from the year 1768 to the year 1854 received by the churchwardens and accounted for by them in their accounts with other sums received by them as part of the revenues of the church, such as pew rents and offertories.

In the year 1854 the burial ground was closed by an Order in Council pursuant to the Burial Act, 1852, and a burial board was constituted for the parish, a new burial ground being obtained at Hanwell. From 1854 to 1865 the ground rent of 30*l.* was received by the burial board, apparently under the

impression that it was their duty to keep the old burial ground and its chapel in order. In the year 1865 the original leases fell in, and the rector and churchwardens, acting under the direction of the vestry, granted renewed leases for twenty-one years at rents amounting altogether to over 2000*l.* a year. The consents required by the Burial Act, 1857, to such leases were not obtained. From that time the rents were collected by the vestry clerk as rents due to the legal owners, the rector and churchwardens, and paid to a separate account, which was ultimately transferred to the general management account of the vestry; and from the year 1871 the rents were paid direct by the vestry clerk to that account and were applied by the vestry as part of the ordinary revenues of the parish.

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The leases expired in 1886 and were renewed for short periods with the consents required by the Burial Act, 1857. In 1900 the houses were pulled down and fresh building leases were granted by the rector and churchwardens under the direction of the vestry, in some cases with the consent of the council of the city of Westminster and the consents required by the Act of 1857. The property was throughout the whole of this period managed by the vestry, and the rector and churchwardens took no part in the management of it except as legal owners and members of the vestry.

On November 9, 1900, the vestry ceased to exist by virtue of the London Government Act, 1899, and subject to the provisions of that Act the powers of the vestry were vested in the council of the city of Westminster.

By an Order in Council dated May 15, 1900, the burial ground premises had been annexed to the borough of Paddington, but by the City of Westminster (St. George's, Hanover Square) Scheme, 1901, nothing in that order was to affect any right or interest in those premises; and the scheme further provided that the powers and duties of the administrative vestry of St. George, Hanover Square, which related to the affairs of the church should vest in the inhabitants of the ecclesiastical district for the time being attached to the church of St. George, Hanover Square.

The council of the city of Westminster claimed that the power of the vestry of St. George's to administer the income of

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the property for the benefit of the parish had been transferred to them by the London Government Act, 1899, and they brought this action against the rector and churchwardens for a declaration to that effect, a declaration that they were entitled to call upon the defendants to convey the property to them, and an account.

The defendants disputed the plaintiffs' claim, upon the ground that the power in question was a power relating to the affairs of the church within the exception in s. 23 of the Act of 1899, and they counter-claimed for a declaration of the trusts upon which the property was held by them and for the execution of the trusts under the direction of the Court.

Warrington J. held that the property in question came within s. 24 of the Burial Act, 1857, and that the power to direct the application of the rents was not a power relating to the affairs of the church within s. 23 of the Act of 1899, but had passed to the plaintiffs under s. 4 of the Act.

The defendants appealed.

*Danckwerts, K.C., Cave, K.C., and Errington*, for the appellants. This is church property; the vestry of St. George's was originally a church vestry, and these rents are held for ecclesiastical purposes. The nature and origin of ecclesiastical parishes is stated in *Adeson v. Otway* (1); *Viner's Abridgment*, tit. "Parish"; *Comyns' Digest*, tit. "Parish" B, which shew that in its origin the parish was entirely an ecclesiastical division. At the date when 10 Anne, c. 11, was passed, under s. 4 of which the original churchyard was provided, ecclesiastical parishes and ecclesiastical vestries were the only parishes and vestries known, and "cemetery" when used is equivalent to churchyard: *Comyns' Digest*, tit. "Cemetery"; *Reg. v. Burial Board of Bishop Wearmouth*. (2)

The Act 10 Anne, c. 11, which also created an ecclesiastical select vestry, recognizes the fact that parish goes with church and church with parish. Canons Ecclesiastical, 85—89, when referring to minister and parishioners, means vestry—"minister, churchwardens, and parishioners in vestry assembled": *Wilson v.*

(1) (1677) *Freem. K.B.* 227.

(2) (1879) 5 *Q. B. D.* 67.



*McMath*. (1) As to meeting of the vestry, the same view is taken in *Reg. v. D'Oyly* (2), *Reg. v. Select Vestry of St. Margaret, Leicester* (3), and *Berry v. Banner*. (4)

These Acts of the reign of Queen Anne were intended to establish new churches, and contained the necessary ecclesiastical provisions for that purpose. The civil provisions were inserted because they were made necessary by the creation of these new ecclesiastical parishes; but the object of the Acts was to create church parishes. The parish of St. George, Hanover Square, was constituted under the Act 6 Geo. 1, c. xxxii., which incorporated the Acts 9 Anne, c. 22, and 10 Anne, c. 11, and the church was consecrated in 1724. The first vestry was an ecclesiastical vestry nominated by commissioners appointed under those Acts, and was afterwards co-optative. In 1762 a private Act of Parliament, 3 Geo. 3, c. 1., was passed to provide a new churchyard, and thereby the land in question was vested in the rector and churchwardens of St. George, Hanover Square, subject to certain payments. The rector was a corporation sole under the Acts above referred to; and he and the churchwardens were created a corporation *ad hoc* by this private Act. The land was paid for out of church funds, the expenses were paid out of church funds, and the fees were reserved to the church officers. Therefore the land was church property. The building leases were granted by the rector and churchwardens as freeholders. The accounts of the cemetery were always kept by the churchwardens separate from the other accounts of the vestry, and the rents were received by the churchwardens, except for a short time after it was closed in 1854, when the burial board received the rents under a mistake. The vestry subsequently became elective under the Vestries Act, 1831, but everything went on as before and the rector and churchwardens were members of it. By the Metropolis Management Act, 1855, the mode of electing vestries was changed. The churchwardens of this parish still accounted to the new vestry as they had done before the change; the vestry had civil as well as ecclesiastical powers; the rector and churchwardens were *ex officio* members;

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(1) (1819) 3 Phillim. 67, 81.

(3) (1839) 10 Ad. &amp; E. 730.

(2) (1840) 12 Ad. &amp; E. 139.

(4) (1793) Peake, 212.

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and there is evidence in this case that whenever he was present the rector took the chair (ss. 2, 8, 30). Powers and rights in relation to charitable trusts were preserved (s. 91), and a list of such trusts was to be published (s. 199). By s. 3 of the Metropolis Local Management Act, 1856, all duties and powers, including such as related to the affairs of the church, were declared to have been transferred to the new vestries by the Act of 1855. That section was explained and held not to include a power to elect persons to a charity in *Attorney-General v. Drapers' Co.* (1), which was distinguished in *In re Hayle's Estate*. (2) The powers of vestries so far as related to the affairs of the church or to ecclesiastical charities were reserved to them by the Local Government Act, 1894, s. 6. The mode of burying the dead is a matter of ecclesiastical cognizance: *Rex v. Coleridge* (3); *Gilbert v. Buzzard* (4); *Hughes v. Lloyd*. (5)

Property vested in a rector and churchwardens by virtue of their office and for the purposes of their office constitutes a good charitable trust for the ecclesiastical purposes of the parish: *Thorner v. Wilson* (6); *In re Delany* (7); *In re Garrard*. (8) The site of these houses was not consecrated, but the Act 3 Geo. 3, c. 1., upon the construction placed upon it by Warrington J., provided that the whole of the land should be used for the purposes of a burial place even though not actually used for interments.

No doubt in this case the rector and churchwardens were mistaken in continuing to administer the rents of these houses without applying for a scheme: *In re Campden Charities*. (9) Such a scheme would have had regard to the fact that the land was held for ecclesiastical purposes of the parish: *Attorney-General v. Price*. (10) This property was not vested in the vestry, so it did not pass to the council under s. 4 of the London Government Act, 1899, as "their property": *Westminster City Council v. Vicar and Churchwardens of St. Martin-in-the-Fields* (11); but Warrington J. has

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| (1) (1858) 4 Drew. 299.                       | (6) (1858) 4 Drew. 350.      |
| (2) (1863) 31 L. J. (Ch.) 612.                | (7) [1902] 2 Ch. 642.        |
| (3) (1819) 2 B. & Al. 806; 3 Phillim. 337, n. | (8) [1907] 1 Ch. 382.        |
| (4) (1820) 3 Phillim. 335.                    | (9) (1881) 18 Ch. D. 310.    |
| (5) (1888) 22 Q. B. D. 157.                   | (10) (1908) 6 L. G. R. 1075. |
|                                               | (11) (1906) 5 L. G. R. 500.  |

held that the power given by s. 24 of the Burial Act, 1857, to the vestry to direct the application of the rents has been transferred to the council. We submit that this power is within s. 23, sub-s. 1, of the Act of 1899, which provides that "nothing in this Act shall transfer to a borough council any powers or duties of a vestry which relate to the affairs of the church or any interest of a vestry in any church property." Sect. 34 of that Act says that "powers," "duties," and "property" shall have the same meaning as under s. 100 of the Local Government Act, 1888. Sect. 23 of the Act of 1899 shews that the vestry of St. George's has not ceased to exist for all purposes; it continues to exercise, as an ecclesiastical vestry, powers which relate to the affairs of the church. It may be contended upon the construction of the private Act of Parliament that the site of these houses does not form part of the cemetery, inasmuch as it was intended to be used solely for ways and passages to and from the cemetery, in which case it is not within s. 24 of the Burial Act of 1857 at all; but on the assumption that it does, we submit that powers relating to it are powers relating to the affairs of the church. The effect of closing a burial ground under the Burial Act, 1852, is not to provide that it shall never again be used for interments; the right to do so is only suspended, and if in the meantime it is not sold, but produces any fruits, they go to the persons who would have taken them if there had been no closure: *In re St. Pancras Burial Ground* (1); *Ex parte Rector of Liverpool* (2); *Ex parte Rector of St. Martin's, Birmingham*. (3) Nothing may be built on a disused burial ground except for the purpose of enlarging the church: *London County Council v. Dundas*. (4) The Act of 1852 does not affect the right of ownership, and for this purpose the question of consecration is immaterial except as evidence that the land was vested in the rector. This has always been church property and is so still, and the Burial Acts do not touch the question; and the learned judge in the Court below was wrong in holding as he did that under s. 24 of the Burial Act, 1857, the rents of the houses were applicable for the benefit of the civil

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(1) (1866) L. R. 3 Eq. 173, 190.

(3) (1870) L. R. 11 Eq. 23.

(2) (1870) L. R. 11 Eq. 15.

(4) [1904] P. 1.

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parish of St. George as the vestry, now represented by the plaintiff council, should direct, and that this power to apply the rents was not a power relating to the affairs of the church within s. 23 of the London Government Act, 1899. The reason for this decision was that the Act of 1857 incorporates the Burial Act, 1852, which by s. 52 defines "parish" to mean "every place having separate overseers of the poor, and separately maintaining its own poor." But s. 52 only says that it shall have that meaning unless there is something in the subject or context repugnant to that construction; and it is clear that in many sections of the Act the word "parish" must mean the ecclesiastical parish—for instance in ss. 2, 5, 10, 11, 22, 23, 29, 32, 51. The Act would not have been workable if ecclesiastical parishes had been excluded. It has actually been decided that the interpretation clause, s. 52, does not exclude ecclesiastical parishes: *Reg. v. Sudbury Burial Board* (1); *Cronshaw v. Wigan Burial Board*. (2) Sect. 11 of the Burial Act, 1855, shews that this must be so. The word "parish" includes ecclesiastical parishes in the Burial Acts, 1853, 1854, and 1855. Where an Act of Parliament which contains an interpretation clause is incorporated in another Act it is always doubtful whether the definitions are to be taken without modification. The definition of "parish" given in the Act of 1852 is repugnant to the context of, amongst others, ss. 5 and 24 of the Act of 1857. Sect. 24 of the latter Act was not intended to divert trust funds from the purpose to which they were originally dedicated, but was intended to make fruitful land which otherwise would be lying idle, and if, as the learned judge has found, the power to administer these rents was, apart from the Act of 1857, a power relating to the affairs of the church, then upon a fair construction of s. 24 that power remained an ecclesiastical power—see *Carter v. Copley* (3)—and the rents could only be applied by the vestry to ecclesiastical purposes, although a discretion was vested in the vestry as to the selection of the particular ecclesiastical purpose to which the rents should be applied. The management of the rents was entrusted by the Act of 1857 to the vestry in its ecclesiastical aspect. The London

(1) (1858) E. B. & E. 264; 27  
L. J. (Q.B.) 232.

(2) (1873) L. R. 8 Q. B. 217.

(3) (1857) 8 D. M. & G. 680, 691.



Government Act, 1899, split the vestry into two; it is the vestry in its civil aspect only to which the borough council succeeds, and this power is therefore within the exception in s. 23.

[The MASTER OF THE ROLLS intimated that all their Lordships were of opinion that the land in question formed part of the burial ground.]

*Upjohn, K.C., J. Brooke Little, and J. M. Gover*, for the respondents. The whole policy of the burial legislation of the fifties was to transfer provision for burying from the ecclesiastical to the civil authority, leaving to the ecclesiastical authority nothing beyond the reading of the service. Down to 1852 provision was made for burial in churchyards and cemeteries under several different titles. Primarily there was the churchyard, which was of course consecrated. Then additions from time to time were made to the churchyard, some wholly consecrated, and some, as in this case, only partially consecrated. There were also private cemeteries; and these were of two classes, cemeteries belonging to different sects, and cemeteries owned by private persons for profit. The law took no particular note of these until the Acts of 1852 and 1853, which gave power to close them. Then the Act of 1857 by s. 24 empowered the trustees of disused burial grounds, whether held in trust for the parish or for private persons, to let or sell such unconsecrated lands as had never been used for interments and provided for the mode of distribution of the moneys derived from such letting or selling. Under 3 Geo. 3, c. 1., the dominant trust was in favour of the parish, and coupled with that was a particular trust as to the mode of enjoyment. The trust as to the mode of enjoyment was put an end to by statutory authority, but the trust for the parish has not ceased, and where a burial ground is held in trust for the parish the Legislature has committed to the vestry the power of determining how the moneys derived from selling or letting the unconsecrated and unused portions thereof shall be applied for the benefit of the parish, using the terms "vestry" and "parish" in their civil and not in their ecclesiastical sense. *Reg. v. Sudbury Burial Board*(1), unless distinguishable, ought to be overruled, and it is really inconsistent in principle with *Reg. v.*

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(1) E. B. & E. 264.

C. A. *Walcot Overseers*. (1) The section confers on the vestry a perfectly general discretion, and it contains no indication that the moneys must be applied to church purposes. Stress has been laid upon the origin of this property, but origin is immaterial; the material thing to be considered is the purposes to which the property is to be applied: *In re St. Bride's, Fleet Street, Church or Parish Estate*. (2) The power of administering these rents is therefore not a power relating to the affairs of the church, and it passes to the plaintiffs as the universal successors of the vestry under the London Government Act, 1899. [They also referred to Burn's Ecclesiastical Law, 9th ed., vol. i. p. 264; Com. Dig. tit. "Cemetery" B; *Andrews v. Cawthorne* (3), as to the nature of the right to burial.]

*Danckwerts, K.C.*, in reply, referred to Phillimore's Ecclesiastical Law, 2nd ed., vol. i. p. 650; *St. Margaret's, Rochester, Burial Board v. Thompson* (4); *Attorney-General v. Humphry*. (5)

*Cur. adv. vult.*

March 5. COZENS-HARDY M.R. The facts in this case have been so fully and clearly set forth by Warrington J. in his judgment that I think I should not be justified in restating them in detail. It is sufficient to say that the question raised in the appeal is whether the rents received in respect of certain houses in the Bayswater Road, built upon unconsecrated ground on the south of a cemetery which has been closed, ought to be paid to the plaintiffs to be applied for the benefit of the inhabitants of the parish of St. George's, Hanover Square, in such manner as they think fit, or whether a scheme ought to be directed for the proper application of the funds. The land was acquired in the third of George III. and vested by statute in the rector and churchwardens of the parish of St. George's, Hanover Square, for ever, to be used, appropriated, and enjoyed by the inhabitants of the parish as and for a cemetery or burial place, and for ways and passages to and from the same for the use and benefit of the inhabitants for ever. The land thus vested in the rector and churchwardens

(1) (1862) 2 B. & S. 555.

(3) (1745) Willes, 536.

(2) (1877) 35 Ch. D. 147, n.

(4) (1871) L. R. 6 C. P. 445, 454.

(5) Unreported.

comprised not merely the strip now covered by the houses, but a field of about five acres, which was converted into a cemetery and consecrated and used until closed by Order in Council. I am clear that any part of the land thus acquired might have been used for cemetery purposes. In fact, a portion of the strip immediately in front of the chapel was consecrated in 1818 and used as a burial ground. The cemetery was acquired by virtue of certain statutes of the reign of Anne which I need not more particularly refer to. Houses were built on the site of the present houses almost immediately after the third of George III. The old vestry of St. George's gave place to a select vestry, which by s. 3 of the Metropolis Management Amendment Act, 1856, acquired all the duties, powers, and privileges, including such as relate to the affairs of the church, which might have been performed or exercised by the old vestry. The cemetery having been closed in 1854, a burial board was formed under the Act of 1852. This Act was amended by various subsequent Acts, including in particular the Act of 1857. By s. 24 of the last-mentioned Act, in all cases in which unconsecrated ground or buildings is or are vested in a trustee or trustees, either under any local Act or otherwise, for the purpose of a cemetery or burial ground, which has been closed, power is given to the trustees or trustee for the time being of such cemetery or burial ground, with the sanction of the Secretary of State, to let or sell any part or parts in which no interment shall have taken place, and the net moneys to be received are to be applied in discharge of any incumbrance affecting the cemetery or burial ground, and any residue of such moneys shall, where such land or buildings shall have been held in trust for any parish, be applied in such manner for the benefit of such parish as the vestry of such parish shall direct. I should observe that the words "parish" and "vestry" have the meaning stated in the definition clause, s. 52, of the Act of 1852. Now it may well be that if these houses had been taken by a railway company, under statutory powers, either before or after the Act of 1857, the purchase-money would have been applied for purposes of an ecclesiastical nature, similar, as far as possible, to those affecting the cemetery. I assume this in favour of the appellants without deciding it. But in my opinion s. 24

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deliberately altered this. The earlier words in the section clearly apply to the property in question in this action. Leases have been granted with the requisite consent purporting to be under the powers conferred by that section, and in my opinion Parliament enacted that where a cemetery of this peculiar character, intended and provided for the purpose of burial of the inhabitants of a parish, had a portion unconsecrated and unused, it should be competent to the vestry to direct the application of the residue of the moneys in any way they might think fit, whether secular or ecclesiastical, for the benefit of such parish, which means, of course, of the inhabitants of the parish. I decline to limit these words in any way or to hamper the full discretion of the vestry. If, therefore, nothing happened after 1857, I think the vestry could have claimed to direct the application of the residue of the money. But the London Government Act, 1899, abolished the vestry, and by s. 4 all their powers and duties, including those under any local Act, are transferred to the borough council, and that council are made their successors. It seems to me plain that this section covers the present case unless s. 23, sub-s. 1, excludes it. The material words in s. 23 are, "Nothing in this Act shall transfer to a borough council any powers or duties of a vestry which relate to the affairs of the church or any interest of a vestry in any church property." In my opinion the power conferred by s. 24 of the Act of 1857 upon the vestry was not a power which related to the affairs of the church. I see nothing to limit the operation of s. 4. In my opinion the judgment of Warrington J. was correct and this appeal must be dismissed.

FLETCHER MOULTON L.J. In my opinion the decision in this case turns upon the view that is taken of the scope and meaning of s. 24 of the Burial Act, 1857, and I propose, therefore, to examine this section by itself before applying it to the facts of the case.

The purpose of the section is obvious. By the numerous orders that had been made under the Burial Acts a large number of intramural cemeteries or burial grounds had been closed for burial. So far as the land comprised in these burial



grounds consisted of land in which interments had taken place it could, of course, be applied to no other purpose. The same might be said of land which though not actually used for burials had been consecrated. It would shock the feelings of a large portion of the community if consecrated land were permitted to be used for secular purposes. But to such of the land as had not been used for interments and had not been consecrated neither of these considerations applied, and there was no reason why it should not be put to such useful secular purposes as it might be fit for. The object of the section was to permit this to be done.

It follows that the section must be limited to the case of land which is so dedicated to the purposes of burial that it required legislative interference to free it and permit it to be applied to other purposes. Otherwise it would be interfering with private rights if it imposed terms or limitations on the doing of that which individuals had already the right to do. Accordingly the section opens by defining the cases to which its provisions apply, namely, "all cases in which unconsecrated land or buildings is or are vested in a trustee or trustees, either under any local Act or otherwise, for the purposes of a cemetery or burial ground." It is only cases in which such lands have been by order closed for burial that come within the section.

Inasmuch as in ordinary cases such lands could ex hypothesi be put to no permanent use without this legislative assistance, seeing that they were already dedicated to a purpose which was no longer permissible, the whole of the economic or realizable value thus obtained might fairly be looked upon as the creation of the Legislature, and it might justly consider itself entitled to decide to whom the benefit should go. It was certainly desirable that it should lay down rules on the point, as otherwise intricate legal questions might arise leading to endless litigation. Whether moved by such reasons or not, it is clear that the Legislature does in this section lay down in clear and precise language what is to be done with the moneys arising out of the sale or user of these lands.

It directs that they shall be in the first place applied "in discharge of any incumbrances affecting such cemetery or burial ground, and any debts which such trustee or trustees may have

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properly incurred in their fiduciary capacity." This provision was almost a matter of course. Such claims must be satisfied before we arrive at the property which is in any equitable sense at the disposal of the Legislature. A question was raised during the argument as to whether the direction that incumbrances should be discharged did not in some way link up this unconsecrated land with the rest of the burial ground, and, therefore, with the consecrated portion of it. Personally I am of opinion that the incumbrances referred to are incumbrances on the unconsecrated ground which is spoken of in the opening words of the section, a part of which, namely, that not used for interments, is to be freed, and it is only as incumbrances on such unconsecrated ground that they are to be discharged. It may well happen that in some, perhaps in most, cases the incumbrances will extend to other lands which are consecrated, and that in discharging these incumbrances such other lands will incidentally be freed. But that is an accident due to the circumstances of the individual case. I can find nothing in the section which contemplates the existence of or relates to any consecrated lands dedicated to burial purposes, and in the direction to discharge incumbrances I can discover no indication of any intention of the Legislature to do anything more than follow the universal rule that incumbrances are to be looked upon as deductions from the value of the incumbered property and must be discharged from any proceeds realized by its sale or use.

It is the residue with which in fairness the Legislature is entitled to deal; and it does deal with this residue in clear and specific terms. It directs that it shall "where such land or buildings shall have been held in trust for any parish be applied in such manner for the benefit of such parish as the vestry of such parish shall direct," and then goes on to deal with the case of their having been held in trust for private persons, a case with which we have admittedly nothing to do. In other words, the Legislature has given the go-by to all questions of the origin of the trust, and in the case of burial grounds held in trust for parishes has looked only at the question for whose use did the trustees hold the same as a burial ground. This seems to me to be fair and reasonable, seeing that by hypothesis it was held

in trust for the use of the parish, although it may be true that without legislative sanction it could be used only for a particular purpose. But, whether we think it fair or not, I have no doubt that this is what the section provides.

I have now to apply these provisions to the facts of this particular case. In the first place I have no doubt that these lands are within the section. By 3 Geo. 3, c. 1., s. 1, these lands and the lands adjoining, which form the actual cemetery, are vested in the rector and churchwardens of the parish of St. George, Hanover Square, and it is enacted that they shall "be used, appropriated, and enjoyed by the inhabitants of the said parish of St. George, Hanover Square, as and for a cemetery or burial place, and for ways and passages to and from the same for the use and benefit of the inhabitants of the said parish for ever."

Subject to a minor point with which I will presently deal, it is to my mind impossible to imagine a case of lands which come more specifically under the very language of the section. They are lands vested in trustees under a local Act for the purpose of a burial ground and held in trust for the parish of St. George, Hanover Square, for that purpose. The only point raised with regard to this is based on the mention of "ways and passages to and from the same" in the special Act. It was contended that the strip of land in question was bought and vested in the trustees, not for a burial ground, but only for approaches to a burial ground. In my opinion this is unsound. Although no doubt it was contemplated that ways and approaches would occupy this strip or some part of it, the whole of the land was bought for the whole of the purposes enumerated, and it would not have been ultra vires to have used this strip as part of the burial ground and made the approaches on other land, or even to have dispensed with specific approaches altogether and made the cemetery reach up to the public road, and, seeing that ways and approaches are purposes strictly ancillary to the use of the land as a burial ground, I do not think that the mention of them in the section adds to or takes away from the vesting of the whole of the land in the trustees for the purpose of a cemetery or burial ground.

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It follows, therefore, in my opinion, that the proceeds of the letting or sale of the unconsecrated portion of this land upon which no interments had taken place (which are the moneys in question here) must under s. 24 of the Burial Act, 1857, "be applied in such manner for the benefit of such parish as the vestry of such parish shall direct." The leases granted in 1886 were, in my opinion, the first steps taken under and in accordance with s. 24. From 1886, therefore, till 1900, when the vestry ceased to exist by virtue of the London Government Act, 1899, the proceeds of those leases were rightly applied by the vestry for the benefit of the parish in such manner as they from time to time directed. There is no limitation in the section as to the purposes to which such moneys are to be applied, otherwise than that they are to be applied "for the benefit of such parish," and, therefore, it was *intra vires* to use them for any purposes for which parochial money could properly be applied. They were in the same position as any other source of revenue of the parish not appropriated to any specific purpose.

The only remaining question is, what is the effect of the London Government Act of 1899. By that Act the corporation of Westminster was made the successor of the vestry of St. George, Hanover Square, and by s. 4 the powers and duties of the vestry and their property and liabilities were transferred to the corporation. It is admitted that the words of transference are sufficient to give to the corporation the same powers of applying these moneys to the use of the parish of St. George, Hanover Square, as the vestry formerly possessed, unless the reservations in s. 23 affect the question. It is contended on behalf of the appellants that s. 23, sub-s. 1, excepts these matters from the general transfer of powers and property from the vestry to the corporation because they are "powers or duties of a vestry which relate to the affairs of the church or any interest of a vestry in any church property." I cannot agree with this contention. To my mind these matters certainly do not relate to the affairs of the church, nor can I come to the conclusion that the property in question is church property. To decide this latter point we must consider the state of matters at the date when the Act of 1899 came into force. At that date the proceeds of these leases were by statute



applicable by the vestry as they might direct for the benefit of the parish. They were, therefore, wholly the property of the parish, and not of the church, and applicable as the governing body of the parish thought fit. We have heard a long argument as to the provenance of the funds which originally purchased these lands, which were, as we have seen, held in trust for the use of the parish for a burial ground. In my opinion matters of this kind are irrelevant. These leases were granted under the powers given by s. 24 of the Act of 1857, and the proceeds of those leases were by the same section given to the parish through the medium of its vestry, and, therefore, even if a case might have been made out regarding these lands as being in some sense church property prior to that Act, such considerations are irrelevant for the purpose of deciding whose property are proceeds obtained by means of powers first granted by that Act which are coupled with specific directions as to the destination of such proceeds.

I am therefore of opinion that the judgment of the learned judge in the Court below was right and that this appeal should be dismissed with costs.

BUCKLEY L.J. The whole question in this case is whether, having regard to the legislation since the year 1857, the borough council is the authority which in s. 24 of the Burial Act, 1857, is called "the vestry of such parish." Warrington J.'s judgment has answered this question in the affirmative. I so fully agree with the statement of facts, the reasoning, and the conclusions of the learned judge's judgment down to within twenty-five lines of the end that I am prepared to adopt so much of it in its entirety, and I may be quite brief in stating my view of the circumstances under which the question arises for decision. Under the Act 3 Geo. 3, c. 1., I think that the five acres forming the one parcel and the strip of waste forming the other parcel dealt with by that Act are to be treated as one whole. They were as a whole, in the language of the Act, to be used, appropriated, and enjoyed by the inhabitants of the parish for a cemetery or burial place, and for ways and passages to and from the same for the use and benefit of the inhabitants of the said

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parish for ever. These parcels were by the Act settled upon and vested in the then rector and churchwardens and the rectors and churchwardens of the parish church for the time being for ever. They were, I think, for this purpose ecclesiastical officers, and there was created a right in the rector to have fees, and an obligation in the churchwardens to pay the reserved rents. The 600*l.* which was paid for the five acres and the expenses of the private Act of Parliament and the expenses of the erection of the wall and of the chapel were provided out of ecclesiastical funds. The ground rents were received by the churchwardens and the outgoings in respect of the reserved rents were paid by the churchwardens and were included in their accounts as part of the revenues of the church in common with the pew rents, offertories, and so forth. The fact that the 600*l.* was paid for the five acres and not for the waste does not, to my mind, affect the proposition that the two parcels as a whole were acquired with moneys provided out of ecclesiastical funds. No additional consideration except the reserved rents was paid in respect of the waste, but it was from ecclesiastical funds that all moneys paid for the acquisition of the two parcels as one whole were defrayed. Upon all these facts I am at one with the learned judge. From these facts it appears to me to follow that the lands were vested in the rector and churchwardens as ecclesiastical persons for a particular parochial charity, namely, the provision and maintenance of a burial ground for all the inhabitants of the parish. The rector and churchwardens were trustees, but their cestuis que trust were not the inhabitants of the parish as individuals. The rector and churchwardens were trustees of a particular parochial charity in whose benefit any parishioner was entitled to share. Upon this I refer to Sir George Jessel's words, which had the approval of Lindley and Lush L.JJ. in *Attorney-General v. Humphry*. (1)

The vestry (being the body mentioned in s. 4 of the Act of 1857) is beyond all doubt a body which enjoyed powers and owed duties divisible into two classes, namely, those which do and those which do not relate to the affairs of the church. Upon this it is sufficient to refer to the language of s. 3 of the Metropolis

(1) Unreported.

Management Amendment Act, 1856, and s. 23 of the London Government Act, 1899. The next inquiry, I think, is whether the power or duty which lay in the vestry by virtue of s. 24 of the Burial Act, 1857, was of the one class or the other. To answer this question I must examine more closely the language of s. 24 of the Act of 1857. It is a section which has to do with unconsecrated land vested in trustees for the purposes of a cemetery or burial ground. It will be noticed that in these initial words the trustees are not spoken of as trustees for a parish if it be a case of that class, or trustees for private persons if it be a case of that class, but as trustees for a purpose, namely, trustees for the purposes of a cemetery or burial ground. When, therefore, at the end of the section I find the land spoken of as lands held in trust for a parish, I must read that as meaning lands held for the purposes of a cemetery or burial ground for the benefit of a parish. In other words, the trust is not one for a class of persons, but a trust for a purpose by which any one of a class of persons may benefit. It is a trust for a parochial charity and not a trust for persons residing in a parish. This section, then, dealing with unconsecrated land vested in trustees for the purposes of a cemetery or burial ground, contemplates the case of a cemetery being closed, and it provides that if the land satisfies two qualifications, namely, first, that it has never been consecrated, and, secondly, that it has received no interments, there shall be power in the trustees of the cemetery or burial ground (that is in this case the rector and churchwardens) to let or sell. The first destination of the moneys to arise is the discharge of any incumbrances affecting the cemetery or burial ground. In other words, if I am right in saying that the trust of the burial ground is a trust for this particular parochial charity, the first trust of the proceeds is to discharge incumbrances upon the property which is bound by that charitable trust. The destination of the residue then is dealt with by the last paragraph of the section, and it is upon that paragraph that the question arises. That paragraph has to do with two classes of cases, the one where the land is held in trust for a parish, and the other where it is held for the benefit of private persons. The destination of the residue is to be as the vestry of the parish

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shall direct in the one case, and rateably among the cestuis que trust in the other. In this context, the question is whether the power thus to be exercised by the vestry of the parish is a power relating to the affairs of the church, which by s. 23 of the Act of 1899 is excepted from the transfer to the borough council. Going back to the judgment of the learned judge, I have failed to trace any reasoning by which he arrives at the conclusion contained in that passage in his judgment which begins with the words "the inevitable conclusion therefore is." I agree that the conclusion is that the proceeds of the unconsecrated land are applicable in such manner for the benefit of the parish of St. George as the vestry of that parish shall direct. But the question is, what body are now the vestry in whom the power of direction resides? I do not agree that the power which the vestry had of directing the application was not a power relating to the affairs of the church, and I cannot trace any reasoning which led the learned judge to the conclusion that it was. Suppose that some part of the entire whole, whether being part of the consecrated or of the unconsecrated ground, had been taken under compulsory powers, to whom would the income of the resulting funds, or the funds themselves, have gone? I think the answer is that they would have gone to ecclesiastical purposes. They might have been applied to the purchase of another burial ground, with a right in the rector to fees similar to that which he enjoyed in the former burial ground. To my mind, in the absence of some provision in s. 24 to the contrary, the same is true of proceeds of sale or letting under the Act. Moreover, the question is not as to the proper destination of the funds, but as to the identity of the "vestry" in whom the power of disposal of the funds is vested by the Act. If the judgment under appeal is right, the trustees in whom the power to let or sell resides are ecclesiastical persons, and the vestry which has to direct the destination of the proceeds is the borough council. The churchwardens as ecclesiastical persons remain under the statute of 3 Geo. 3, c. 1., liable for the reserved rents, but the proceeds of leases or sales made by the rector and churchwardens go as a body which is not an ecclesiastical body directs. I cannot think that in the absence of any words in the relevant



Acts apt for this purpose anything in the Act of 1857 leads to this result. If I am right in thinking that this land was originally vested in the rector and churchwardens as ecclesiastical persons as the result of a purchase with ecclesiastical funds, with an obligation in the churchwardens to pay the reserved rents and charge them in their accounts relating to the revenues of the church, and that their power under the Act of 1857 was a power relating to the affairs of the church, then it follows that the "vestry" in s. 4 of the Act of 1857 is not the borough council.

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The power created by s. 24 of the Act of 1857 was not, I think, a power to alter the destination to which but for that section the funds would have gone, but a power to determine, as between any purposes to which it could legitimately have gone, to which of those purposes it should be applied. If the property was, as I think, originally church property, the Act of 1857 gave no power to alter its character. It would seem to me unreasonable that to the extent of incumbrances the funds should go to benefit the parochial charity, namely, the cemetery or burial ground, and as to the residue should be applicable as the borough council, which does not control powers relating to the affairs of the church, should direct. To sustain the decision appealed from it seems to me that I must find some provision which would divert the proceeds from the original purposes for which the lands were acquired to some other purpose, and I fail to find it. I think that the power of the vestry under s. 24 is a power relating to the affairs of the church, and consequently did not pass by transfer to the borough council, and that this appeal ought to succeed. But as the majority of the Court are of the contrary opinion it must be dismissed.

March 19. The question of the costs of the appeal was now argued.

*Danckwerts, K.C.* (with him *Cave, K.C.*, and *Errington*), for the appellants. In the exceptional circumstances of this case the costs of the appeal ought to be paid out of the accumulated rents. The ordinary rule is that a trustee who appeals does so

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at his own risk as to costs, because he is only interested so far as he wants protection and he is completely protected by the decision of the Court of first instance: *In re Earl of Radnor's Will Trusts* (1); but that rule does not apply to a case where there is no cestui que trust who can bring the matter before the Court. By the private Act 3 Geo. 3, c. 1., the rector and churchwardens are made a corporation ad hoc, and they are sued as a corporation, and there is no one else to undertake the proper defence of this fund except the corporation that owns it: *Reg. v. White* (2); *Rex v. Inhabitants of Essex*. (3) Further, the costs of this appeal are debts properly incurred by the trustees in their fiduciary capacity within s. 24 of the Burial Act, 1857, and as such must be deducted before any trust is created for the benefit of the parish.

*Uppjohn, K.C.* (with him *J. Brooke Little* and *J. M. Gover*), for the respondents. There is nothing in the circumstances of this case to take it out of the ordinary rule as laid down in *Rowland v. Morgan* (4) and *In re Earl of Radnor's Will Trusts*. (1) There is no suggestion that the order of Warrington J. caused the defendants any embarrassment in the execution of their trusts; the appeal is brought simply on the merits, and, being unsuccessful, it ought to be dismissed with the usual consequences.

COZENS-HARDY M.R. This is a very peculiar case, and I hope that in anything I say I shall not trench upon what I take to be the undoubted and well-established rule of the Court. That rule is, I think, this, that a trustee has a right—not merely that he can appeal to the discretion of the Court, but that he has a right—to indemnity out of the trust fund in any case in which he reasonably and properly applies to the Court or is brought to the Court for directions in the administration of the trust. But that right ends with the order which has been obtained giving full effect to the indemnity which as I say is a matter of right. If a trustee appeals to the Court of Appeal against a decision in the Court below and the appeal is unsuccessful, I feel no doubt that under ordinary circumstances the trustee as appellant is in

(1) (1890) 45 Ch. D. 402.

(2) (1884) 14 Q. B. D. 358.

(3) (1792) 4 T. R. 591.

(4) (1849) 13 Jur. 23.

no better position than another appellant, and under ordinary circumstances if the appeal fails, it fails with what we so frequently describe as the usual consequences. But this is not in my view an ordinary case, and, without in any way infringing upon those principles which I have endeavoured to lay down, I think we shall in the exercise of our discretion be doing what is right and just in saying that the costs of this appeal, though unsuccessful, may be paid out of the large trust fund which is in the hands of the trustees.

This is a very difficult case, in which there was undoubtedly a very serious question as to the persons who were entitled to determine the beneficial enjoyment or the proper mode of application of the proceeds of this valuable property, if sold, or of the rents and profits of it until sale. The plaintiffs in the action, the Corporation of Westminster, alleged that they were the persons who had the right to determine the application within certain limits. The defendants, the trustees, contended wrongly, as we thought, but undoubtedly not without considerable plausibility, that that was not so, that there ought to be a scheme directed with a view to the application of the rents for ecclesiastical purposes rather than other purposes which might be either civil or ecclesiastical. There was nobody to present that view to the Court of Appeal unless the trustees themselves did it, for the plaintiffs, for some reason which I have not been able to understand, did not bring in the Attorney-General and make him a party to the action, as I think they would have been well advised if they had done. Under these circumstances I think it is right that we should in the exercise of our discretion direct the costs of this appeal to be paid out of the trust funds, but I desire to make this clear, that in the direction which we give we do not include, as the learned judge did in the Court below, the costs of taking and transcribing the shorthand notes of the proceedings, nor do we give any direction to the taxing Master that the costs of three counsel are to be allowed.

FLETCHER MOULTON L.J. I am of the same opinion, but I wish to say that I think we are making a very exceptional order. Of course a trustee, in a case where there is a doubt as to who

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are his cestuis que trust, has a right to come to the Court for its direction, and a right that the costs of so applying to the Court should come to him out of the fund. But when that question has once been decided by a competent Court, if the trustee chooses to appeal, he is putting himself in the position of espousing the cause of the person who has been decided not to be the cestui que trust in order to displace the title of the one who has been decided to be that cestui que trust. If so, it would be in an ordinary case most unfair that funds which have been decided, and decided rightly, to belong to that particular cestui que trust should be used to defray the expense of trying to displace him. Therefore as a matter of rule a trustee who under such circumstances appeals as an ordinary litigant, and if he is unsuccessful he has no right or claim on the Court to direct the costs to come out of the fund. But I think for the reasons that the Master of the Rolls has given that this is a very exceptional case, and, as we have full discretion, I think we may exercise, without doing any injustice to the plaintiffs, that discretion in the way of allowing the costs limited in the manner stated by the Master of the Rolls to the unsuccessful party out of the fund.

BUCKLEY L.J. The way in which this Court exercises its discretion in dealing with the costs of an unsuccessful appeal is almost without exception, and that rule is that the unsuccessful appellant pays the costs. The appellant has a right to argue that the judge of first instance was wrong, but if he is mistaken in saying he was wrong, he ought not to put his opponent to expense, but ought to pay the costs of his unsuccessful contention. That applies just as much to a trustee as to anybody else. But the present is in my view a very exceptional case. The fact that we are allowing costs here will be no guide, I think, for the purpose of any future case.

The first cardinal feature here is that the question to be determined was in whom a certain power resides—who had the power to direct the destination of the trust funds—and there was no cestui que trust who could appeal from the order below. The only possible persons who could appeal were the present appellants,



the trustees. The Attorney-General not being a party no appeal could be brought to this Court at all except by the persons who have now come.

The second ground is this. It is a ground which as a rule weighs but little. It is the fact that this Court has been divided in opinion. The fact that there was a division of opinion is admissible to shew that it was not unreasonable to appeal, that it was not an idle or frivolous appeal, but an appeal that had at any rate some substance.

The third reason is this, that the singularity of this trust is that as upheld by this Court these trustees are trustees for the respondents only of the residue. The proceeds of sale or letting are applicable in the first instance to certain purposes, including the payment of any debts which such trustees may have properly incurred in their fiduciary capacity, and they are only trustees for the respondents of what remains after that. Of course that means incurred bona fide and legitimately in their fiduciary capacity, but if I am right in saying that they were the only persons who could appeal, because in a sense they had no cestui que trust who could appeal, the question being only one of a power, then it seems to me that their proper costs of taking the opinion of the Court of Appeal are costs which are payable before you come to the respondents at all, and it is only the balance of which they are trustees for the respondents.

Upon all these grounds, and especially upon the first and last, which are peculiar to the present case, I think that we are justified in departing from what I repeat is the rule of this Court almost without exception, and that we not only ought not to make the appellants pay the costs of the appeal, but ought to allow the costs out of the estate.

Solicitors: *Capron & Co.; Allen & Son.*

H. B. H.

C. A.

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CORPORATION

v.

ST. GEORGE,  
HANOVER  
SQUARE  
(RECTOR AND  
CHURCH-  
WARDENS).

Buckley L.J.

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1909

Feb. 19.

*In re* ELLIS'S SETTLEMENT.

ELLIS *v.* ELLIS.

[1908 E. 4.]

*Marriage Settlement—Covenant to settle after-acquired Property—Gift from Husband.*

There is no general rule of construction of covenants, in marriage settlements, to settle after-acquired property of the wife that a gift from the husband to the wife during coverture is to be excluded from the covenant.

A marriage settlement made in 1882 contained several covenants by the husband and wife to settle "all the real and personal estate whatsoever and wheresoever (if any) to which the wife or the husband in her right should upon the solemnisation of the intended marriage, or at any time afterwards during the intended coverture, be or become absolutely entitled for any estate or interest whatsoever in possession or reversion."

In 1908 the husband transferred into his wife's name, as an absolute gift, stocks and shares of the value of 50,000*l.* :—

*Held*, that they were bound by the covenant.

*Coles v. Coles*, [1901] 1 Ch. 711, distinguished.

AN indenture of settlement dated March 9, 1882, and made on the marriage of the Hon. Evelyn Henry Ellis and his wife, then Alberta Mary Hardinge, spinster, contained a recital that upon the treaty for the marriage it was agreed that such assignment as was thereafter contained should be made of certain shares and interests of the said A. M. Hardinge, and that such covenants as were thereafter contained should be entered into with reference to any other present or future property of the said A. M. Hardinge, or of the said E. H. Ellis in her right. Certain shares and interests of the said A. M. Hardinge were then assigned to trustees upon the usual trusts of a marriage settlement; and the deed proceeded, "And this indenture also witnesseth that in pursuance of the said agreement in this behalf and in consideration of the said intended marriage each of them the said Evelyn Henry Ellis and Alberta Mary Hardinge so far as relates to his or her own acts and deeds and the acts and deeds of his or her own executors and administrators and all persons claiming through or under him or her doth for himself and herself and

his or her heirs executors or administrators covenant with " the trustees of the settlement " their executors and administrators that if the said intended marriage shall take effect they the said Evelyn Henry Ellis and Alberta Mary Hardinge respectively and their respective heirs executors and administrators will at the charges of the trust property from time to time as the case will admit by good and effective conveyances assignments and assurances or other acts and deeds to the satisfaction of the said trustees or trustee or their or his counsel convey assign pay and transfer or otherwise cause to be well and effectually vested in the trustees or trustee for the time being of these presents all the real and personal estate whatsoever and wheresoever if any to which the said Alberta Mary Hardinge or the said Evelyn Henry Ellis in her right shall upon the solemnisation of the said intended marriage or at any time or times afterwards during the intended coverture of the said Alberta Mary Hardinge be or become absolutely entitled for any estate or interest whatsoever in possession or reversion." Then followed an exception of jewels, chattels for personal use or enjoyment, savings and purchases out of separate income, and any sums of money or chattels, not exceeding in each case the value of 300*l.*, which might be given or bequeathed to the said A. M. Hardinge by will or otherwise (all which excepted articles and property were to belong to the said A. M. Hardinge for her separate use), and a direction that the property assigned to the trustees should be held by them upon the trusts therein declared of the property settled by the said A. M. Hardinge.

The marriage was solemnized on March 9, 1882. In the year 1907 the said E. H. Ellis transferred into his wife's name certain stocks, funds, shares, and securities belonging to himself of the value of 50,000*l.* or thereabouts. These were intended as a free gift, and Mr. Ellis gave evidence that he would not have transferred them if he had known that they would be included in the settlement.

There were two children of the marriage, infants, who were amply provided for apart from the settlement.

This summons was taken out by Mrs. Ellis for the determination of the question whether the stocks, funds, shares, and

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securities so transferred were bound by the covenant in the settlement to settle after-acquired property.

The defendants were the trustees of the settlement, the husband, and the infant children.

*Hon. E. C. Macnaghten, K.C., and W. M. Cann*, for the summons. In construing covenants in marriage settlements to settle the after-acquired property of the wife the Court looks at the object of the settlement, which is to protect the property of the wife from the husband. It cannot be supposed that the parties to a marriage settlement considered that gifts from the husband to the wife needed such protection, or intended that the covenant should extend to them. The exact point was decided by Joyce J. in *Coles v. Coles* (1), which has been followed in Ireland in *Kingan v. Matier*. (2) Joyce J. there followed the principle laid down by Malins V.-C. in *Dickinson v. Dillwyn* (3) and *Carter v. Carter*. (4)

Those cases and *In re Edwards* (5) shew that the Court looks at the intention in these cases and is not bound by the literal meaning, for the words "during the coverture" are read into the covenant whether they are there or not. Another example is that the covenant will not be held to include annuities and life interests, though the words are wide enough to do so: *In re Dowding's Settlement Trusts*. (6)

*Micklem, K.C., and Heckscher*, for the defendants. The question is merely one of the construction of the covenant. Where a document is expressed in plain, clear, and unambiguous terms it is an undoubted rule of law that what is written must be expounded by itself: see opinion of Williams J. advising the House of Lords in *Shore v. Wilson*. (7) In *Carter v. Carter* (8) Malins V.-C. explained his decision in *Dickinson v. Dillwyn* (3), and shewed that both cases were decided on the construction of the particular covenants, which were joint covenants by husband and wife; and all that he decided was that the covenants did not

(1) [1901] 1 Ch. 711.

(2) [1905] 1 I. R. 272.

(3) (1869) L. R. 8 Eq. 546.

(4) (1869) L. R. 8 Eq. 551.

(5) (1873) L. R. 9 Ch. 97.

(6) [1904] 1 Ch. 441.

(7) (1842) 9 Cl. & F. 355, 540.

(8) L. R. 8 Eq. 556.



include property accruing to the wife after the determination of the coverture under the husband's will. *In re Edwards* (1) turned on the construction of the particular covenant. The restriction of the covenant to property falling in during the coverture does not apply if the husband survives: *Fisher v. Shirley*. (2) The covenant has been held to apply to the wife's separate estate and to jewels: *Willoughby v. Middleton*. (3) In *Coles v. Coles* (4) Joyce J. did not lay down any general rule. In *Kingan v. Matier* (5) Barton J. only followed *Coles v. Coles*. (4)

The argument that these covenants are to be construed according to intention was raised, but rejected by the Court of Appeal, in *Scholfield v. Spooner*. (6)

*Hon. E. C. Macnaghten, K.C.*, in reply.

SWINFEN EADY J. (after reading the recital and covenant in the settlement, and stating the facts as above). It is to be observed that in this covenant each of the contracting parties, the husband and the wife, covenants separately, and the language used is quite wide enough to include the securities now given by the husband to the wife. It is quite clear that they are personal estate to which the wife has during her coverture become absolutely entitled in possession. If the question be merely one of the true construction of the deed, there could only be one answer.

But it is said that the settlement must be construed according to the intention of the parties; and certain authorities were cited, of which *In re Edwards* (1) is an example, which decided that if in such a covenant the words "during the said intended coverture" should be omitted, the covenant must be read, in the absence of an expressed contrary intention, as if they were there. That rule has been applied as to the wife's property in cases where the wife survives, but not where the husband survives. That is given as an illustration of the way in which the Court construes covenants in a marriage settlement. A further rule of

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(1) L. R. 9 Ch. 97.

(2) (1889) 43 Ch. D. 290.

(3) (1862) 2 J. & H. 344.

(4) [1901] 1 Ch. 711.

(5) [1905] 1 I. R. 272.

(6) (1884) 26 Ch. D. 94.

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construction is contended for—namely, that, unless there be express words to the contrary, gifts from the husband to the wife are not included in these covenants. That is put as a rule of construction, not as a rule of law. It is not contended that it is impossible by apt words to include gifts from the husband to the wife, but that as a rule of construction, in the absence of express words, the Court will assume that it could not be the intention of the contracting parties to include such gifts. Unless there is direct authority by which I am bound so to hold, I must give effect to the settlement according to its clear and unambiguous meaning.

The case on which reliance is mainly placed is the recent decision of Joyce J. in *Coles v. Coles*. (1) In that case a small sum (280*l.*) was given by the husband to the wife during the coverture. The wife had died, and the husband was her legal personal representative; the sole surviving child of the marriage brought an action to determine that the gift was caught by the settlement. There was no covenant in form; the settlement was an assignment of all the wife's property, which as to future property could only take effect as a contract. Joyce J. held that, as a matter of construction, it was extremely doubtful whether the gift was included in the settlement. He says: "Upon the document itself it appears to me to be extremely doubtful whether it was intended to be an assignment of anything in which the lady had not at the time of the settlement any estate or interest"; and a little later on, "The result is that I think it doubtful whether this assignment was intended to include after-acquired property; but I decide this case upon the grounds stated by Malins V.-C. in his judgment in *Dickinson v. Dillwyn* (2) where he says, 'On the broad ground of intention, I am of opinion that the words of this covenant never could have been intended to apply to property which the wife should acquire from her husband.'" So that upon a settlement of doubtful construction Joyce J. followed the opinion of Malins V.-C. expressed in *Dickinson v. Dillwyn*. (2)

Now in that case the husband was dead, and by his will had left all his property to his wife absolutely. The question therefore

(1) [1901] 1 Ch. 711, 713.

(2) L. R. 8 Eq. 550, 551.

arose after the determination of the coverture, and not during its continuance, the interest being that of the wife in her husband's property under her husband's will. Malins V.-C. first considered the language of the covenant itself. He says: "The terms of the covenant are, that the husband and wife will both 'join and concur' in settling; that applies to a case in which it would be necessary for the husband to concur; and besides this, it may be said that there is the gross improbability of its being intended to apply to property which the husband might choose to give to his wife"; and then he held that the interest in question was not bound, and the passage occurs which was quoted by Joyce J.

In the same volume, and immediately following, there is another case, *Carter v. Carter* (1), where Malins V.-C. refers to his previous judgment. He says: "I was of opinion that 'at any time hereafter' meant the time that was embraced in the coverture, and that only; and upon that ground, first, I decided that property which the wife took under the will of her husband was not bound;"—that is, as being property not devolving during the coverture—"I also decided it upon the great improbability that the contracting parties, contracting that future property should be subject to the settlement, should have intended that property which the husband should leave to the wife should be embraced in the covenant." Now in the passage I have read from *Dickinson v. Dillwyn* (2) the words are "property which the husband might choose to give to his wife," but in the explanation the phrase is "property which the husband should leave to his wife"; and later in the judgment in *Carter v. Carter* (1) the Vice-Chancellor says (3): "In this case, as in *Dickinson v. Dillwyn* (2), I also rest upon the great improbability that the contracting parties should have contemplated that property given by the husband to the wife by his will should be included in her marriage settlement"; so that the ground he relied on was that the property was given to the wife by the husband's will, and not that it was acquired from him during the coverture.

The case before Joyce J. has been followed in Ireland in

(1) L. R. 8 Eq. 551, 556.

(2) L. R. 8 Eq. 546.

(3) L. R. 8 Eq. 557.

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*Kingan v. Matier* (1), which was the case of a gift by the husband to his wife during coverture, and Barton J. drew attention to the language of the covenant. He said: "The settlement was made in 1883, but the covenant is not a covenant by the wife alone. If it had been in that form, the claim of the trustees to have this property transferred to them might, perhaps, in view of the date of the settlement, be more difficult to meet. I express no opinion upon a form of covenant which is not before me." The covenant in the present case is a covenant by the wife, and therefore is not covered by the case in Ireland. In my opinion the rule to be applied in the present case is that stated by Cotton L.J. in *Scholfield v. Spooner* (2): "Whatever the consequence may be, where the parties have entered into a covenant, we have nothing to do but to construe the covenant and give effect to the construction, however inconsistent it may be with what we may guess to have been the real intention of the parties." In this case the language of the covenant is clear, and it embraces this interest. I do not find any rule of law or of construction that in the case of a covenant to settle after-acquired property, however wide the language, the Court is bound to construe the covenant so as to exclude property given by the husband to the wife during the coverture. This covenant extends to the wife's separate property, and according to the rules for the construction of deeds, the Court must give effect to the clear, unambiguous meaning of the words used; I am therefore bound to hold that the securities in question are caught by the covenant, and I so decide.

Solicitors : *Cutler & Allingham.*

(1) [1905] 1 I. R. 272, 277.

(2) 26 Ch. D. 94, 100.



*In re* NORTH.  
GARTON *v.* CUMBERLAND.

[1909 N. 37.]

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*Trustees—Open Brickfield—Implied Power to Let from Year to Year—Royalties  
—Tenant for Life and Remaindermen—“Rents Issues and Profits.”*

A testator, part of whose property consisted of land with brick earth upon it which was being worked under a lease granted by him at a royalty, gave his real estate to trustees upon trust “to pay the rents issues and profits” to certain persons for their lives, with remainders over. The will contained a trust for sale after the death of the last surviving tenant for life, and a direction that until sale the trustees should cause the real estate to be kept “in good and tenantable order and repair” :—

*Held*, that the trustees had an implied power to let the brickfield from year to year, and that the whole of the rents and royalties must be paid to the tenants for life for the time being.

JAMES NORTH, who died in September, 1863, by his will gave all his real and personal estate to trustees upon trust to allow his wife to occupy and use his dwelling-house and certain furniture and chattels, and to pay her an annuity of 160*l.* during her life, and to pay to each of his two sons an annuity of 25*s.* a week and allow each of them to live in one of his houses rent free, and to pay certain weekly sums for the maintenance of the children of a deceased daughter until they attained twenty-one, and then to pay to each such child a legacy of 25*l.* and to pay a further legacy, and proceeded : “And subject to the payments aforesaid upon trust to pay the rents issues and profits of the whole of my real estate and the annual sum of 100*l.* out of my personal estate and out of the moneys to be invested that may arise from the sale of my real estate or any part thereof hereinafter directed to be sold half-yearly in four equal parts.” The testator then directed one fourth part to be paid equally to the children of a deceased daughter with benefit of survivorship, and the other three fourth parts to be paid to his three named daughters respectively, such annual payments to be made until

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the decease of the survivor of his wife and his said four daughters, and he directed that if any daughter should die during the life of the others or other of them leaving issue her issue should take their parent's share equally between them, and that if any of his said daughters should die as aforesaid without issue her share should go to the survivors, and after providing for the division after the death of his wife of the furniture, &c., given for her use, and giving the trustees power to sell at any time certain parts of his real estate not including the brickfield, the testator proceeded: "And I do direct my said trustees until the sale thereof to cause the whole of my said real estate to be kept in good and tenantable order and repair and I declare that it shall be lawful for them to cut down any poles timber or timberlike trees from time to time at their discretion and from and immediately after the decease of my said wife and the survivor of my said four daughters I direct that the whole of my real estate shall be sold"; and he directed his trustees to divide the proceeds and his personal estate among his grandchildren as therein mentioned.

At the time of the testator's death part of his real estate consisted of five acres of land which contained a large quantity of brick earth and was then let on lease to a tenant, who dug and removed the brick earth for brickmaking and paid a royalty. This lease did not expire until December, 1870. During its continuance the trustees paid the royalties received to the tenants for life as income. From the year 1871 until 1899 the trustees let the land as a brickfield from year to year at a fixed minimum or dead rent and royalties, and during this period they paid the minimum rent to the tenants for life, but accumulated the royalties and kept them in their hands. In 1899 the brick earth was all worked out, and after that date the land was let for agricultural purposes.

This summons was taken out by the trustees of the will for the determination of the question whether all the money received by the trustees as rent and royalties for the brick earth ought to have been paid to the tenants for life for the time being, or whether the whole or any part thereof ought to have been accumulated for the benefit of the remaindermen.

At the date of the summons the testator's widow and two of the three daughters who survived him were dead; one daughter was still living.

*Lyttelton Chubb*, for the trustees.

*Tomlin*, for the representatives of a deceased tenant for life. The brickfield was open at the testator's death and the tenants for life for the time being were undoubtedly entitled to the royalties under the words of the will: *Miller v. Miller* (1); *Leppington v. Freeman*. (2) It may be said that the trustees had no power to let; if so, the royalties must be regarded as compensation or damages for trespass, and the tenants for life are entitled to such compensation: *In re Barrington*. (3) If a lease had been granted under the Settled Land Act a part of the royalties would have been accumulated for the remaindermen, but the beneficiaries were only equitable tenants for life who had never gone into possession and could not exercise the powers of the Settled Land Act. Trustees have no power to grant mining leases, and the Court cannot give them any such power: *Wood v. Patteson*. (4) In *Farwell on Powers*, 2nd ed. p. 593, it is forcibly argued that trustees who have duties to perform must have an implied power to let from year to year, and it has been so held in an Irish case, *Fitzpatrick v. Waring* (5), but there is no direct authority in England.

*Andrewes-Uthwatt*, for some of the persons entitled in remainder. The trustees had no power to let either on lease or from year to year. Their proper course would have been to get a lease granted by the Court under the Leases and Sales of Settled Estates Act, 1856 (19 & 20 Vict. c. 120), or the Settled Estates Act, 1877 (40 & 41 Vict. c. 18), and the Court would then have directed a part of the royalties to be accumulated. The Settled Land Act, 1882 (45 & 46 Vict. c. 38), has established a principle that tenants for life are not to receive the whole of royalties for minerals, and even if the trustees had power to let from year to year they were doing an injustice to the remaindermen by exercising it.

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(1) (1872) L. R. 13 Eq. 263.

(3) (1886) 33 Ch. D. 523.

(2) (1891) 40 W. R. 348.

(4) (1847) 10 Beav. 541.

(5) (1882) 11 L. R. Ir. 35.

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*C. L. Collard and B. W. Ginsburg* appeared for other parties having the same interest.

SWINFEN EADY J. The question to be decided in this case is whether the tenants for life are entitled to the royalties which have arisen from the working of brick earth in lands belonging to the testator.

The testator acquired land of about five acres in extent in which there was a large quantity of brick earth. He granted a lease, and at the date of his death on September 5, 1863, there were upwards of seven years of this lease unexpired. The tenant was in possession, working the brick earth and making bricks and paying royalty according to the earth dug. That lease expired on December 25, 1870, and from that date until the brick earth was exhausted, some time in the year 1899, the field was let for brickmaking purposes on a yearly tenancy; sometimes it was let by one or more trustees, now deceased, on a verbal agreement, apparently, for no written documents have been found, but for another part of the time it was let on a written agreement, and in all cases only for a tenancy from year to year. In 1899 the brick earth was exhausted, and the field was then let for agricultural purposes. During part of the later years while the trustees have been the owners of it a minimum rent has been paid for the surface in addition to the royalties. The trustees took the view that as from the death of the testator until the expiration of the lease the tenants for life under the will were entitled to these royalties, and they therefore paid the amount down to the expiration of the old lease at Christmas, 1870, but since that date they have accumulated the royalties, not being satisfied that when the letting was by the trustees from year to year the tenants for life were entitled to receive the amount, and a considerable sum has accumulated since the year 1871.

Now under the terms of the will the testator gave and devised his real estate, including the land in question, subject to certain payments which are not material, upon trust to pay the rents, issues, and profits of the whole of his real estate half-yearly between certain persons, and that trust is still subsisting. The



will did not contain any power of sale, or any trust for a sale of the lands in question until after the determination of the life interests which are still subsisting. It is only upon the death of the testator's widow and the survivor of his four daughters that the trust for sale of the real estate arises, and that event has not yet happened, because one of the testator's daughters is living. But the will contains this direction: "And I direct my said trustees until the sale thereof to cause the whole of my said real estate to be kept in good and tenantable order and repair and declare that it shall be lawful for them to cut down any poles timber or timberlike trees from time to time at their discretion." There is a trust for sale in the future: "And upon further trust that from and immediately after the decease of my said wife and the survivor of my said four daughters I direct that the whole of my real estate then remaining unsold shall be sold." So that the case which I have to deal with is a case where the trustees had vested in them no subsisting trust or power of sale, but a direction that the real estate is to be kept in good and tenantable order and repair. Under those circumstances I am of opinion that the letting of this brickfield by the trustees from year to year was strictly in accordance with their duty and that it was a proper thing for them to do, and not in any way going beyond the powers which the law vests in them as trustees. They have only dealt with the land in the same way as the testator had dealt with it by allowing it to be worked as a brickfield, and they have not in fact granted any lease, so that the question as to what the rights of the parties in the royalties would have been if a lease had been granted under statutory powers does not arise: no lease ever was granted.

Then the will in terms imposes upon the trustees the duty of keeping the real estate in good and tenantable order and repair. How were they to do that as regards this brickfield otherwise than by a short letting from year to year? It certainly could not have been intended to impose upon the trustees the duty of themselves working the brickfield and embarking in the business of brickmaking; and on the other hand they could not leave the field producing no income at all, as a burden involving the cost and expenditure of keeping the place in order. The trustees

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were acting within their powers in granting the letting in question from year to year, and the tenants for life are entitled to the whole of the royalties. The will gives "all the rents, issues, and profits of the whole of my real estate," and the income which has been derived from the brickfield consists of rents, issues, and profits of that field. I think, if authority were wanted, the case of *Miller v. Miller* (1) is a direct authority. Indeed the present case is stronger than that, because, as I have pointed out, in the present case there is no subsisting trust of sale, and in *Miller v. Miller* (1) the argument turned upon the fact that there was a discretionary power of sale, and it was said that the trustees ought not by postponing the exercise of their discretion to have affected the relative rights of the tenant for life and remainderman. It appears from the record, that in *Miller v. Miller* (1) no lease was granted, but the tenant of the brickfield was allowed to remain in possession on a tenancy not longer than an annual one until the brick earth had been worked out, and in that case the Vice-Chancellor held the tenant for life entitled to the whole of the rents and profits. I think this is a case of an open brickfield properly dealt with by the trustees which has produced rents and profits in the shape of royalties, and that all the fund so produced belongs to the tenants for life for the time being.

Solicitors : *Richardson, Sadlers & Callard*, for C. W. & F. H. Toone, Loughborough ; *Woolley & Whitfield*, for W. Slater, Loughborough.

(1) L. R. 13 Eq. 263 ; 41 L. J. (Ch.) 291 ; 20 W. R. 324.

*In re* HORSNAILL.  
WOMERSLEY *v.* HORSNAILL.

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March 10, 13.

[1909 H. 165.]

*Will—Trust for Sale of Land—Power to postpone—Settlement of Proceeds—Share vested in Possession—Right of Beneficiary to insist on immediate Sale.*

Where land is devised to trustees in trust for sale with a discretionary power of postponement, and the proceeds are settled in trust for various beneficiaries, the vesting in possession of the share of one of the beneficiaries does not put an end to the power of postponement, or entitle that beneficiary to call either for an immediate sale of the entirety or for a conveyance of an undivided share in the land.

*Trower v. Knightley*, (1821) 6 Madd. 134; *Lantsbery v. Collier*, (1856) 2 K. & J. 709; *Taite v. Swinstead*, (1859) 26 Beav. 525; *In re Cotton's Trustees and London School Board*, (1882) 19 Ch. D. 624; *In re Lord Sudeley and Baines & Co.*, [1894] 1 Ch. 334; and *In re Tweedie and Miles*, (1884) 27 Ch. D. 315, discussed and applied.

ORIGINATING SUMMONS.

By his will dated September 26, 1892, a testator, having bequeathed an annuity of 200*l.* a year to his wife for life reducible to 100*l.* on remarriage, devised and bequeathed his residuary real and personal estate to his trustees upon trust for sale and conversion and out of the proceeds to invest a sufficient sum to answer the annuity by means of the dividends, which sum should fall into residue on the cesser of the annuity, and subject thereto to stand possessed of the said proceeds of sale and conversion and the investments thereof as to one equal third part thereof upon trust for the testator's son Alfred for life, with remainder to his children living at the testator's death who being sons should attain twenty-one or being daughters should attain that age or marry; as to one other equal third part thereof upon trust for the testator's son Walter for life, with a similar remainder to his children; and as to the remaining equal third part thereof upon trust for the testator's daughter Mary for life, with a similar remainder to her children.

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The will then contained the following proviso:—"Provided always and I hereby declare that it shall be lawful for my said trustees wholly or partially to postpone the said sale conversion and collection so long as they shall deem proper and [*sic*] may during such postponement make any outlay which they may consider proper for the benefit or in respect of my estate But the net income produced during any such postponement from all or any part of my estate howsoever invested and of whatsoever description shall as from my death be applicable as income and no property not actually producing income shall be treated as producing or entitling any one to receipt of income."

The testator died on August 17, 1901.

Walter died on March 7, 1908, leaving two married daughters and a son Henry, who had assigned his one third of one third share to the Lancashire and Yorkshire Reversionary Interest Society, Limited, hereinafter called the Reversionary Company.

The Reversionary Company called upon the trustees to realize the entire estate in order to pay their share. The estate now consisted of trust securities which were readily divisible and of certain freehold houses near Rochester which had not yet been sold, and the realization of which the trustees desired to postpone for the reasons stated in the judgment.

This summons was issued to determine (*inter alia*) whether the trustees' power of postponement continued notwithstanding the death of Walter and the falling into possession of his share.

When the summons came on the judge directed the trustees to appropriate sufficient trust securities to answer the annuity by their income and to appropriate one third of the remaining trust securities to Alfred's share, one third to Mary's share, and to divide the remaining third between the Reversionary Company and Walter's two daughters.

The question as to the trustees' right to postpone the sale of the houses was then argued.

*R. M. Pattisson*, for the trustees.

*E. W. Sutton*, for Alfred and the annuitant. There is only one and not three settlements of the three shares, and the fact that one share is at home does not put an end to the trust for



sale over the entirety—*Tait v. Swinstead* (1)—or the ancillary power of postponement (2), which must both be exercised for the benefit of the whole estate.

*Beebee*, for Mary, adopted the same argument.

*Dighton Pollock*, for the Reversionary Company. When the estate becomes divisible the power to postpone ceases and comes to an end of itself: *In re Crowther*. (3) In the present case the estate is partly divisible, as one third share is vested in possession. The duration of the power depends on the testator's intention—*In re Cotton's Trustees and London School Board* (4)—and he cannot have intended to give the trustees a discretionary power to postpone realization and payment of vested shares until all the purposes of the settlement were exhausted, instead of paying or conveying them within a reasonable time after their falling into possession.

*Cur. adv. vult.*

March 13. SWINFEN EADY J. The only question raised by this summons which remains to be disposed of is the contention put forward by the Reversionary Company, namely, that the trustees are not entitled any longer, in the exercise of the discretion vested in them under the will, to postpone the sale of the real estate remaining unsold, but must proceed to a sale of it forthwith. [His Lordship stated the provisions of the will, including the power of postponement, and continued:—] The testator's son Walter died on March 7, 1908, and thereupon the one third share of which he was life tenant became divisible into three parts, to one of which the Reversionary Company are entitled.

A considerable portion of the testator's estate has been realized and can readily be divided into three parts, and one of those parts distributed among the persons entitled.

But there are numerous small freehold houses at or near Strood, Rochester, or Chatham, forming part of the testator's

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(1) 26 Beav. 525.

(2) Vide *In re Blake*, (1885) 29 Ch. D. 913, 917, where Cotton L.J. apparently treated a power of post-

ponement as still subsisting, though two shares had vested in possession.

(3) [1895] 2 Ch. 56, 60.

(4) 19 Ch. D. 624.

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estate, which remain unsold. The trustees have taken advice with regard to the expediency of selling these houses at the present time, and they are advised that for various reasons the sale should be further postponed. One of those reasons is that the districts in which most of the property is situated are greatly affected by the cement industry, which is at present in a very depressed state, several of the factories being shut down, causing an exceptional amount of unemployment. The trustees say that, if they still have any discretion vested in them, they desire to exercise it by postponing the sale of these houses for the present. The Reversionary Company insist that, as they are now entitled in possession to one third of a one-third share, the sale cannot be postponed any longer. I am of opinion that this contention is not well founded. The trusts of the will are still subsisting, as there are two life tenants living, even though all the grandchildren may have attained twenty-one, or being granddaughters have been married; and the power to postpone a sale, or to make any outlay upon the estate, may still be exercised. The discretion with regard to the application of the net income and as to property not producing any income is just as appropriate now there are only two life tenants as when there were three.

The owners of the one third share which is now vested in possession are not entitled to call for any conveyance of an undivided third part of the freeholds, nor to insist upon an immediate exercise of the trust for sale of the entirety.

*Trower v. Knightley* (1) was a case of a power of sale, and not a trust for sale, but the power was given during the continuance of the trust. The testator there had devised an estate to trustees in fee, in trust as to one moiety for his daughter A. for life, with remainder to her children at twenty-one, and in trust as to the other moiety for his daughter B. for life, with remainder to her children at twenty-one. A power of sale was given to the trustees for the time being during the continuance of the trust. A. was dead and her children had all attained twenty-one. B. was living and had infant children. The trustees had contracted to sell, and the purchaser objected to the title on the ground

(1) 6 Madd, 134.

that as one moiety had become absolutely vested in the children of A. the power of sale was at an end, and therefore the infant children of B. would not be bound by the alleged exercise of a power which was non-existing. Leach V.-C., however, held that the trust was still subsisting, and therefore the power; that the children of A. were not entitled to call for a present conveyance of their moiety, but that the powers of the trustees would continue until there were owners competent to deal with the whole estate.

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*Lantsberg v. Collier* (1) is to the same effect. Page Wood V.-C. there held that a power of sale was valid for all the purposes of the settlement so long as the trusts of the settlement continued, and said that the Court looks to the whole intent and purpose of the settlement, and until the effect of the settlement is spent, and the estates under it absolutely vested in possession, the trusts continue, and a power of sale continues too. *Taite v. Swinstead* (2) is to the same effect. Indeed, under special circumstances, the powers may continue, although all interests in the estate have vested in possession: see *In re Cotton's Trustees and London School Board* (3) and *In re Lord Sudeley and Baines & Co.* (4).

In the present case there is one settlement, by the will, of one estate upon trust for sale, not three settlements; the settlement effected is of the proceeds of sale; no one cestui que trust can call for a conveyance of the fee, or any undivided share of it. Where there is a trust for sale all the cestuis que trust must be absolutely entitled and concur in applying for a conveyance in lieu of a sale in order to obviate the need for a sale—*In re Tweedie and Miles* (5)—and until they do so the trust for sale will, in my opinion, continue. The power to postpone the sale will also continue until all the shares become vested in possession.

It is not disputed that the trustees are acting perfectly bona fide and in the exercise of a wise discretion in postponing the sale. I therefore determine that the Reversionary Company

(1) 2 K. & J. 709.

(3) 19 Ch. D. 624.

(2) 26 Beav. 525.

(4) [1894] 1 Ch. 334.

(5) 27 Ch. D. 315.

SWINFEN are not entitled to insist upon an immediate sale of the remaining  
EADY J. freeholds.

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HORSNAILL, Solicitors: *Sismey & Cook, for Arnold, Baker & Day, Rochester ;*  
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NEVILLE J. ATTORNEY-GENERAL v. WEST GLOUCESTERSHIRE  
WATER COMPANY.

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Feb. 19.

[1908 A. 1117.]

*Company—Waterworks—Statutory Powers—“Supply of Water”—Supplying  
Water outside Statutory Limits—Ultra vires—Injunction—West Gloucester-  
shire Water Act, 1884 (47 & 48 Vict. c. cxxlix.), ss. 3, 4, 5, 6, 28, 34, 36,  
56—West Gloucestershire Water Act, 1899 (62 & 63 Vict. c. clviii.), ss. 4,  
12—Metropolis Gas Act, 1860 (23 & 24 Vict. c. 125), s. 6—“Supply of Gas.”*

A water company authorized by their special Act to supply water to certain places, defined by the Act to be the limits of the Act, cannot supply water outside those limits although not expressly forbidden by the Act so to do.

A water company, authorized by their special Acts to erect waterworks and supply water within certain limits which included the parish of A., agreed to supply water to W., the owner of property in the adjoining parish of H., and accordingly extended their main in the parish of A. to the boundary where it adjoined the parish of H., and then, at the cost of W., laid a main some distance along a highway in the parish of H. and thence laid pipes to W.'s property:—

*Held*, that the water company, on the construction of their special Acts, were not entitled to supply water outside their statutory limits.

*Held*, also, that the water company were supplying water to W., not at the point where their main reached the boundary in the parish of A., but at the terminals on W.'s property where he received and applied it to his use.

*Held*, therefore, that the water company were acting ultra vires, and an injunction was granted at the suit of the Attorney-General.

The analogy of the decision of the House of Lords in *Gas Light and Coke Co. v. South Metropolitan Gas Co.* (1889), 62 L. T. 126, on the expression “supply of gas” in the Metropolis Gas Act, 1860, applied to the expression “supply of water” in the special Acts of the water company.

# ACTION.

This was an action by the Attorney-General, at the relation of the Bristol Waterworks Company (who were also co-plaintiffs),



to restrain the defendant company from supplying water outside NEVILLE J. their statutory limits.

The defendant company were incorporated by the West Gloucestershire Water Act, 1884, for the purpose of making and maintaining waterworks and for supplying water within the limits of the Act and for carrying on the business usually carried on by water companies. The Act incorporated the Waterworks Clauses Acts, 1847 and 1863, and divers other general Acts, and by s. 4 the limits of the Act for the supply of water were stated to be certain specified parishes and townships in the county of Gloucester. The limits of the Act of 1884 for the supply of water were extended by the West Gloucestershire Water Acts of 1887 and 1899 to certain other parishes in the counties of Gloucester and Somerset; and the parishes to which the said limits of supply were extended by the Act of 1899 included the parish of Almondsbury, which adjoined the parish of Henbury, in the county of Gloucester, but no part of the parish of Henbury was by any Act included within the limits within which the defendant company were authorized to supply water or erect works.

The plaintiff company were incorporated by the Bristol Waterworks Act, 1846, for the purpose of supplying water to the city of Bristol and other places. By several special Acts the powers of the plaintiff company were consolidated and extended, and in particular by the Bristol Waterworks Act, 1872, the limits within which the plaintiff company were authorized to supply water were extended so as to comprise the said parish of Henbury. The plaintiff company, pursuant to their statutory powers, laid mains and pipes and were supplying water in some parts of the parish of Henbury, but in May, 1908, their system had not reached that part of the parish where was situate Hollywood Tower, the residential estate of Sir George White. This property was close to the boundary between the parishes of Almondsbury and Henbury at a place called Blackhorse Hill, where the boundary crossed a highway called Cribb's Causeway.

On May 4, 1908, Sir George White entered into a written agreement with the defendant company for the supply of water to his property for all purposes, under which the defendant company

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NEVILLE J. extended their main in Almondsbury parish to the boundary at Blackhorse Hill, and from thence they (at the cost of Sir George White) laid a main for a short distance along Cribb's Causeway in Henbury parish to a place at the roadside where they erected a hydrant and a meter, and from thence pipes were laid on to Hollywood Tower. The hydrant was under the control of Sir George White for cleansing the pipes, and by the agreement he was to be supplied with and pay for a certain number of gallons of water per year, which was to be measured at the meter.

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In July this action was commenced by the Attorney-General at the relation of the Bristol Waterworks Company, who were co-plaintiffs and who alleged that Hollywood Tower was within their area of supply and that they were ready and willing to do all necessary acts for supplying and to supply the same with water. The plaintiffs claimed a declaration that the defendant company were not entitled to supply to any person water within the parish of Henbury or in any other place or places outside the area within which the defendant company were by statute authorized to supply water, an injunction in the same terms, and other relief. It was conceded that the pressure at the reservoir of the defendant company carried the water through the main and pipes of Sir George White to the places on his property where he required to use it. The arguments turned mainly on the special Acts of the defendant company, which were common form. (1)

*Upjohn, K.C.*, and *W. M. Cann*, for the plaintiffs. The preambles of the Acts of 1884 and 1889, and ss. 2, 4, 5, 6, 28, 34, 36, and 56 of the Act of 1884, as extended and varied by ss. 4 and 12 of the Act of 1889, shew that the rights and duties of the defendant company in supplying water are restricted to their statutory limits. Moreover, their powers to break up streets and lay mains and pipes and to supply water are subject to ss. 28 and 35 of the Waterworks Clauses Act, 1847, by which the exercise of such powers is expressly confined to the limits of their special Acts. The defendant company, therefore, whether

(1) See note on p. 645, post.

they acted as principals or as the agents of Sir George White, had no power to lay the main and pipes in the parish of Henbury. We say they are in fact delivering water outside their district, because the delivery is either at the meter, which is outside their district, or at the places on Sir George White's property where he receives and applies it for his purposes. But if we are wrong in this, then we say that they are not entitled to deliver in bulk at their boundary for use outside. There is nothing in their Acts which defines the expression "supply of water," and no authority on the point, but it is submitted that the decision of the House of Lords in the case of *Gas Light and Coke Co. v. South Metropolitan Gas Co.* (1) on the expression "supply of gas" in the Metropolis Gas Act, 1860, affords an analogy. In that case the defendant gas company were supplying gas that was being consumed outside their limits, and the Court of Appeal (2), following, although not agreeing with, the decision of Lord Cairns and Rolt L.JJ. in *Imperial Gas Light and Coke Co. v. West London Junction Gas Co.* (3), held that the gas was being supplied at the meter which was within the limits of the defendant gas company; but the House of Lords distinguished *Imperial Gas Light and Coke Co. v. West London Junction Gas Co.* (3), and held, reversing the decision of the Court of Appeal, that the supply of gas was not at the meter but at the points where it was consumed, and granted an injunction. Here, if the supply of water is at the meter, that is outside the limits of the defendant company; but our contention is that the water is supplied at the place or places on Sir George White's property where he receives and applies it for his purposes, and that the defendant company are acting ultra vires and ought to be restrained.

*Sir C. A. Cripps, K.C.*, and *Christopher James*, for the defendant company. The point raised in this case is important and has not been decided before. It is a question of the rights of the defendant company, and not of the rights of the plaintiff company. Apart from statutory provisions, no water company has a monopoly in its own district. We agree that there is some analogy between the expressions "supply of gas" and "supply

(1) 62 L. T. 126, 130.

(2) (1888) 58 L. T. 899, 906.

(3) (1867) 58 L. T. 900 (n.).

NEVILLE J. of water," but the gas case relied on is distinguishable. There  
 1909 the Court was considering the construction of s. 6 of the Metro-  
 ATTORNEY- polis Gas Act, 1860, which is a monopoly clause. That section  
 GENERAL assigned certain districts to certain gas companies, and provided  
 v. that the limits of each company should be the district so assigned  
 WEST to it and that "no other company or person than the company  
 GLOUCESTER- to whom such limits" were assigned should supply gas for sale  
 SHIRE within those limits. There is no such clause in any of the Acts  
 WATER of the defendant company, nor any express prohibition against  
 COMPANY. supplying water outside their limits. A company, so long as it  
 complies with its statutory duties and obligations, has the same  
 right of dealing with its property as an individual, subject to any  
 limitations imposed upon it: *Foster v. London, Chatham and  
 Dover Ry. Co.* (1) Under s. 6 of the Act of 1884 the defendants  
 were established to erect waterworks and supply water within  
 the limits and also "for carrying on the business usually carried  
 on by water companies," and by s. 36 they can enter into agree-  
 ments to supply water for other than domestic purposes; and by  
 s. 56, as modified by s. 12 of the Act of 1899, they can contract to  
 supply water in bulk, i.e., for wholesale purposes. Within their  
 limits the company are bound by the provisions of their special  
 Acts and the Waterworks Clauses Acts, but it is submitted that  
 it is not inconsistent with their general power under their Acts for  
 the company to supply water outside their limits so long as they  
 keep a sufficient supply for their customers within the limits and  
 do not invade a monopoly in any adjoining district: *Attorney-  
 General v. Great Eastern Ry. Co.* (2); *Halifax Corporation v.  
 Soothill Upper Local Board.* (3) In *Halifax Corporation v. Morley  
 Corporation* (4) the defendants were expressly prohibited from  
 supplying water within another district. The cases shew that  
 there is a distinction between supply of water and use of water,  
 and we say that if we supply in bulk within our limits to be  
 used outside our limits we are not contravening our statutory  
 powers. Here it is immaterial whether the meter is within or  
 without our limits, because our point of supply is just within the

(1) [1895] 1 Q. B. 711, 720.

(3) (1874) 30 L. T. 513; on appeal,

(2) (1879) 11 Ch. D. 449, 504.

31 L. T. 6.

(4) (1894) 10 Times L. R. 454.



boundary of Almondsbury parish, where the water in our main NEVILLE J. passes into the main of Sir George White.

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NEVILLE J. This case raises a point of great importance, and which, curiously, has not been previously decided. It is a short point, turning on the construction to be put upon the defendant company's private Acts of Parliament. Two plans have been put in which, I think, shew precisely what has been done in the present case by the defendant company. The plan of the defendant company shews the system of water pipes which have been laid on Sir George White's property, Hollywood Tower, and they must be taken to be corrected by the plan put in by the plaintiffs, which shews more precisely the relative position of the hydrant and the pipe leading to the meter through which the water flows on to the system laid in the Hollywood Tower property. The defendant company did the whole work which is shewn by the plans, but so far as the apparatus lies in the parish of Henbury, the work was done by the defendant company and the cost was paid by Sir George White. The water is conducted past the intake for the meter, or outlet for the meter, to a dead end in which there is a hydrant, and that hydrant is used, amongst other purposes, for the purpose when necessary of clearing the water which flows to the end of the pipe, and which sometimes contains certain sediment and other matter, which it is as well to get out of the pipes in order to prevent interfering with the supply to the house or premises in Hollywood Tower. First of all I will deal with the point that has been raised, that such a supply of water is incident to the powers of the defendant company, and that there is nothing in their supplying water to Sir George White, although he resides on premises which are outside their district, inconsistent with the powers granted them by their Acts of Parliament: or, to put it in another way, that what they are doing is only reasonably incident to the use of their property and to the exercise of the powers which have been vested in them by the Legislature. It seems to me that that cannot be so. They are supplying Sir George White precisely as they supply all their other customers, subject to this, that he takes by meter, and probably most or many of the other

NEVILLE J. customers pay by rate on the value of their houses ; but I see no distinction in substance between the way they supply water to Sir George White and the way they supply water under the powers of their Acts. It seems to me that, inasmuch as they are limited to a district, whatever the effect of that limitation may be, they cannot say that the supply of water outside their district is incident to a supply of water within their district, because to say so would do away with the limitation of the district altogether. I think, therefore, that the case of *Attorney-General v. Great Eastern Ry. Co.* (1) and cases of a similar kind which have been referred to do not help us on this. Then, again, there is the case of *Halifax Corporation v. Morley Corporation* (2), and the case of *Halifax Corporation v. Soothill Upper Local Board.* (3) It appears to me that neither of those cases assists in the determination of the present case. In one case the Court was dealing with the question of a statutory monopoly and what rights that monopoly conferred, and in the other case whether a company which had bargained to supply 25,000 gallons at least and up to 75,000 gallons a day to a certain township was entitled to refuse to supply the township because the township proposed to sell it to somebody else. The real question in this case is what is meant in the private Acts by the words "supply of water." Turning first of all to the Act of 1884, which was the original Act, I find that under s. 4 a limit, and a territorial limit, is inserted in the Act—"the limits of this Act for the supply of water shall be the parishes and townships," and so on. Then, when I come to s. 6, I find the purpose for which the company is established—"The company shall be established for the purpose of making and maintaining the waterworks and for supplying water within the limits of this Act." I therefore take it that any supply of water without the limits of the Act is something altogether beyond the limits of the purposes for which the defendant company were established. And, again, I have to find out as best I can what the Legislature intended by "supply of water" or "for supplying water." There are other sections which all refer to the limit of a

(1) 11 Ch. D. 449.

(2) 10 Times L. R. 454.

(3) 30 L. T. 513 ; 31 L. T. 6.

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district for the exercise of the power of the company, and s. 56 NEVILLE J. contains a power for the company to enter into contracts "for the supply by the company within the limits of this Act of water to any such sanitary authority company corporation public body officers or persons respectively whether in bulk or otherwise and for what purposes soever for use within such limits"—that is, the limits of the district. In the succeeding Acts, one of which is the Act of 1899, by which the limits of the district were enlarged so as to include the parish of Almondsbury, s. 56 is re-enacted with the substantial variation that the right to sell, which in s. 56 is in bulk or otherwise, is limited to sale in bulk. I think the case of *Gas Light and Coke Co. v. South Metropolitan Gas Co.* (1), both before the Court of Appeal and in the House of Lords, affords considerable assistance in arriving at what the meaning of "supply" is in the present Act, because I think there is a fairly close analogy between the "supply of gas" in that case and the "supply of water" in the particular Act before me. What does "supply" mean? Does it mean substantially the same thing as the "supply of gas" was held to mean in the case to which I have referred? I should say that the distinction between the statute that I have to construe and the section that was construed in the case in question has been pointed out, and it is this—that in the case referred to the Court was dealing with a monopoly granted to companies within their own districts, and it is said that that is distinguishable from the grant of powers to a company within its own district, and with regard to that I entirely agree. One difference of importance is at once noticeable. Supposing that in this case there had been a monopoly clause, and the provision had been that the defendant company were not to supply water in the district of the plaintiff company, then the plaintiff company would themselves have had a right of action, and could have restrained the defendant company from so doing. It seems to me quite clear in the present case that the plaintiff company can make no case of that kind, and the only question which can be decided is whether the defendant company are acting ultra vires, in which case, at the suit of the Attorney-General, the Court ought to grant an

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(1) 58 L. T. 899; 62 L. T. 126.

NEVILLE J. injunction. But otherwise, so far as the interpretation to be put upon the use of the word "supply" goes, I do not see that there is any difference between "supply of gas" and "supply of water." The Court in either case has to decide what is meant by "supply"—in the one case the supply of gas, and in the other case the supply of water. In the case of gas, although it might be said that the property in the gas passed from the supplying company to the consuming company at the meter where the consuming company took the gas over from the supplying company, it was held, that although it might be said to be the point of sale and delivery, it was not the point of supply, that the meaning of "supply" in reference to gas was supply for the purpose of user, and that it would be perfectly useless to send the gas to the meter unless under conditions which would enable it to be used for the purposes of lighting the premises for which it was intended. It seems to me that exactly the same reasoning applies in the case of water. It would be no good in this case sending the water down to the meter; you must supply the water at the point where the consumer desires to make use of it, and I think the water is supplied in the present case upon the premises of Sir George White, either where he takes it through stand pipes, or where it is transferred into a cistern, or where it is made available for use by the consumer, Sir George White. It will be noticed in the present case that if you apply the test of the meter as the point of supply, it will not avail the defendant company, because the meter itself is outside their boundary; but what I have already said indicates that I have put it upon a broader ground than that. I think that the supply of water covers the delivery of the water for use at the terminals, wherever they may be, at which the consumer takes possession, so to speak, of the water, and devotes it to his own use. I ought before I leave this question of the meaning of "supply" to deal with s. 56 of the Act of 1884 and s. 12 of the Act of 1899. An argument has been addressed to me, not without force, that in this case, where the Legislature intended to limit not only the supply of water but the use of the water to the district defined, that there the express words were used, and it was said that the supply must be not only within the district,

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but for use within the district. It seems to me when you consider the Act carefully that that is quite intelligible and consistent with the construction I have attributed to the word "supply," and for this reason, that with regard to all other supply outside s. 56 the company would be limited to a supply within the district, so that it would be ultra vires if the water was brought to the point at which it was used outside the district. But it is said that in the case of a supply of water in bulk within the district the company might supply it in bulk to an individual, and that would be within the terms of the Act, and he might himself utilize the water outside the limits of the district because the water, once supplied to him within the district, would be beyond the control of the defendant company. It seems to me, however, that the meaning of those words is that nobody shall be entitled to be supplied with water under that section, who intends, when he has got it, to use it outside the district. Therefore it seems to me not only consistent with, but in some sense confirmatory of, the view I have already indicated I take of the word "supply." I think that practically disposes of the matter. It appears to me that the defendants have exceeded their powers, and that there must be a declaration that the defendant company are not entitled to supply to any person water within the said parish of Henbury, or in any other place or places outside the area within which the defendant company are by statute authorized to supply water, and the injunction will follow the words of the declaration. The defendants must pay the costs of the proceedings.

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Solicitors for plaintiffs: *Woodcock Ryland & Parker, for Edward Gerrish & Co., Bristol.*

Solicitors for defendants: *Stanley, Wasbrough, Doggett & Baker, for Stanley, Wasbrough & Co., Bristol.*

NOTE.—The West Gloucestershire Water Act, 1884—after reciting (inter alia):—"Whereas the parishes and townships of" (naming them) "are at present inadequately supplied with water and it is expedient that provisions be made for affording an adequate supply of pure and wholesome water sufficient for the purposes of the inhabitants of the said parishes portion of parish and townships:

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“And whereas the persons in that behalf in this Act named with others are willing at their own expense to undertake the supplying with water of the said parishes portion of parish and townships on being incorporated into a company with adequate powers for the purpose and it is expedient that they be incorporated accordingly and authorised to construct waterworks as by this Act provided and that such other powers as are in this Act contained be conferred on the company for the better and more effectually carrying the purposes of the undertaking into effect . . . .”

—enacts:—

Sect. 2 incorporated with the Act various general Acts including the Waterworks Clauses Acts, 1847 and 1863.

By s. 3 the expressions “the waterworks” and “the undertaking” respectively meant and included “the waterworks and the works connected therewith and the undertaking by this Act authorised.”

Sect. 4 defined “the limits of this Act for the supply of water” to be the parishes and townships named in the preamble.

By s. 5 certain named persons and other parties were thereby “united into a company for the purposes hereinafter mentioned and for other the purposes of this Act and for those purposes shall be and are hereby incorporated by the name of The West Gloucestershire Water Company . . . .”

Sect. 6: “The company shall be established for the purpose of making and maintaining the waterworks and for supplying water within the limits of this Act and for carrying on the business usually carried on by water companies and generally for carrying the powers of this Act into execution.”

Sect. 24 empowered the company to make certain waterworks, including a reservoir, in a certain parish within the limits of the Act.

Sect. 28 imposed a time limit for completion of the works authorised by the Act, “but nothing herein shall restrict the company from extending enlarging altering or renewing any of their . . . . mains or pipes from time to time as occasion requires for supplying water within the limits of this Act.”

Sect. 33: “The water to be supplied by the company shall be constantly laid on under pressure but the company shall not be required to supply water in any case at a pressure greater than that to be afforded by gravitation from the reservoir from which the supply is taken.”

Sect. 34 provided that the company should supply water for domestic purposes at certain rates on the request of any owner or occupier of any dwelling-house in any street in which any pipe of the company should be laid.

Sect. 36: “Subject to the provisions of this Act the company may supply water for other than domestic purposes on such terms and conditions as the company think fit and may enter into agreements for the supply of water by measure either for domestic or other purposes. Provided that such supply for other than domestic purposes do not interfere with the supply for domestic purposes.”

Sect. 56: “The company may from time to time enter into and carry into effect agreements with any sanitary authority . . . . or persons for the supply by the company within the limits of this Act of water to any such

sanitary authority . . . . or persons respectively whether in bulk or otherwise and for what purposes soever for use within such limits and the agreements respectively may be for such times and for such remuneration and on such terms and conditions whatsoever as the contracting parties think fit. Provided that such supply of water do not interfere with the supply of water for domestic purposes within the limits of supply.”

The West Gloucestershire Water Act, 1887, extended the powers and limits of water supply of the company to certain other places.

The West Gloucestershire Water Act, 1899—after reciting (inter alia): “Whereas it is expedient that the limits within which the company may supply water should be extended so as to include the parishes tythings and places in this Act mentioned (in this Act called ‘the extended limits’) . . . .” —enacts:—

Sect. 4: “The limits within which the company may supply water and exercise the powers rights privileges and authorities conferred upon them by the former Acts and this Act shall extend to and include in addition to the parishes and townships mentioned in s. 4 of the Act of 1884 and in s. 4 of the Act of 1887, the parishes of . . . . Almondsbury . . . . in the county of Gloucester . . . . and within and throughout the extended limits the former Acts as amended, and this Act shall henceforth be in full force and have effect.”

Sect. 12: “The company may enter into and carry into effect agreements with any local authority company or person for the supply by the company within the extended limits to any such authority company or person respectively of water in bulk for any purpose for use within such limits for such remuneration and on such terms and conditions and for such period as may be agreed upon Provided that such supply of water do not interfere at any time with the supply of water for domestic purposes within the limits of supply of the company ”

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[1908 B. 3077.]

*Vendor and Purchaser—Contract for Sale of Real Estate—Non-completion on Appointed Day—Interest on Purchase-money—Legal Proceedings by Purchaser—Default of Purchaser—Reasonable Conduct—Settled Account.*

On a contract for sale of real estate the purchaser took an objection which went to the root of the title. Neville J. held that the objection was well founded and the title was bad; the Court of Appeal reversed this decision and the House of Lords affirmed the judgment of the Court of Appeal. By the conditions of sale it was provided that if the purchase should not be completed at the time appointed the purchaser should pay interest on the remainder of the purchase-money at the rate of 5 per cent. per annum from that time until the same should be paid, provided always that if the delay in completion should arise from any cause other than the neglect or default of the purchaser, and if the purchaser should at his own risk and expense deposit the remainder of the purchase-money at any bank upon a deposit account bearing interest and should give notice thereof to the vendor, the vendor should from the time of the notice only be entitled to such interest as should be actually produced by the amount so deposited.

The day fixed for completion was September 2, 1907. On September 4, 1907, after the decision of Neville J., the purchaser placed the balance of the purchase-money, 99,000*l.*, on deposit with a bank and gave notice to the vendors. On February 28, 1908, he took the money off the deposit account and paid it into Court under an order made in lunacy proceedings. The purchase was not yet completed, and the vendors now claimed interest at 5 per cent. per annum on the balance of the purchase-money from the date fixed for completion up to February 28, 1908. The purchaser maintained that they were only entitled to the interest actually produced by the deposit account, and pleaded a settled account:—

*Held*, that a decision by the Court that a requisition is untenable is equivalent to a decision that the purchaser is in default in refusing to complete until the objection is removed; that default involves breach of some duty owed to another; that a person guilty of a breach of duty is guilty of default, but in considering whether he is under that duty the Court will be guided by the nature of the contract and all the circumstances of the case; that there is no rule that conduct amounting to default must be conduct which is unreasonable; that the words “doing what is reasonable under the circumstances” used by Bowen L.J. in *In re Young and Harston's Contract*, (1885) 31 Ch. D. 168, 174, mean the same thing as doing what a person ought to do having regard to his relations



to others, and do not suggest any standard based on what a prudent man would do for his own protection; that the rule there suggested that a vendor of real estate is not guilty of default so long as he acts reasonably having regard to his relations towards other persons interested in the contract applies to purchasers as well as to vendors; that in the present case the delay had been caused by the conduct of the purchaser, who though acting reasonably for his own protection had committed a breach of duty towards the vendors in repudiating the contract although the title was good; and that the settled account under the circumstances was no defence to the claim for interest at 5 per cent. *Bennett v. Stone*, [1902] 1 Ch. 226; [1903] 1 Ch. 509, explained.

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By a contract dated June 18, 1907, a portion of the estate settled by the will of Thomas Worthington was agreed to be sold to Mr. L. S. Cohen by Mr. Gibbon Bayley-Worthington, the tenant for life, and Major-General J. F. Brocklehurst, the committee in lunacy of the remainderman, for 110,000*l.* The purchaser paid a deposit of 11,000*l.*, and upon investigation of the title took the objection that the consent of the protector of the settlement had not been obtained to a disentailing deed of January 29, 1891, and consequently that a good title had not been shewn. On a summons taken out by the purchaser Neville J. supported the objection and held that the title was bad. The Court of Appeal reversed this decision, and the House of Lords affirmed their judgment. The case is reported [1908] 1 Ch. 26; [1908] A. C. 97.

By the first condition of the special conditions of sale attached to the contract the purchase was to be completed within two calendar months from the date when an order approving the agreement should be obtained from the Master in Lunacy. By the ninth special condition the vendors were before the date fixed for completion to commute and discharge all succession and other duties charged on the property.

The third of the general conditions of sale incorporated in the contract was as follows: "The purchaser shall immediately after the sale pay to the vendors' solicitor as stakeholder a deposit of ten per cent. of the purchase-money, and sign an agreement in the form endorsed hereon, and the purchaser shall, as from the day appointed for completion, be entitled to possession or receipt of the rents of the property, and shall pay all outgoing affecting the same, but he shall not be let into

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On July 2, 1907, an order was made in lunacy confirming the contract and directing that the purchase-money and the deposit which had been paid should be paid into Court, and that the succession duty should be paid out of it. The day fixed for completion was therefore September 2, 1907, as provided by the first special condition. After the decision of Neville J. the purchaser took advantage of the third general condition, and on September 4, 1907, placed the balance of the purchase-money, 99,000*l.*, on deposit with a bank and gave notice thereof to the vendors. On February 28, 1908, after the judgment of the House of Lords, he took the 99,000*l.* off deposit and paid it into Court in pursuance of the order of July 2, 1907, and was let

into possession of the property, although owing to various delays connected with the payment of succession duty the purchase had not yet been actually completed. With a view to satisfying the revenue authorities, an apportionment account was agreed to in which the purchaser was debited with the amount of the interest allowed by the bank on the money on deposit and credited with the proportion of the rents payable to him as from September 2, 1907. The parties, however, failed to come to terms with respect to the duties, and the vendors then took up the position that they would not accept the bank interest, which amounted to 1609*l.*, but would require interest on the balance of the purchase-money under the third general condition, namely, 5 per cent. interest on the 99,000*l.* from the date fixed for completion up to February 28, 1908, the date when it was paid into Court, which would amount to 2306*l.* The purchaser refused to pay this sum, and the vendors took out a summons to decide the question. They admitted that the purchaser was entitled to the rents and profits from September 2, 1907.

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*Uppohn, K.C., Romer, K.C., and Underhill*, for the vendors. The delay was caused by the purchaser's objection, and the provision as to the deposit does not relieve him from liability. He could not contend that a good title had not been shewn and yet claim a right to deposit the purchase-money, thus treating the contract as subsisting and one to the benefit of which he was entitled: *In re Hargreaves and Thompson's Contract*. (1) The purchaser was guilty of default, since he made a requisition which was groundless and persisted in it; it has failed, and he must take the consequences: Webster on Conditions of Sale, 3rd ed. p. 321: *In re Young and Harston's Contract* (2); *In re Mayor of London and Tubbs' Contract* (3); *In re Woods and Lewis' Contract* (4); *In re Hetling and Merton's Contract* (5); *In re Pelly and Jacobs' Contract* (6); *Bennett v. Stone* (7); *In re Earl*

- (1) (1886) 32 Ch. D. 454. (4) [1898] 1 Ch. 433; [1898] 2  
(2) 29 Ch. D. 691; 31 Ch. D. 168, Ch. 211.  
174. (5) [1893] 3 Ch. 269.  
(3) [1894] 2 Ch. 524. (6) (1899) 80 L. T. 45.  
(7) [1902] 1 Ch. 226; [1903] 1 Ch. 509, 521.

PARKER J. *of Stafford and Maples*. (1) The purchaser was at all events in default in persisting in the objection after the decision of the Court of Appeal and is therefore liable for full interest since that date: *Perry v. Smith*. (2)

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*Buckmaster, K.C.*, and *T. K. Nuttall*, for the purchaser. Default "means nothing more, nothing less, than not doing what is reasonable under the circumstances—not doing something which you ought to do, having regard to the relations which you occupy towards the other persons interested in the transaction": per Bowen L.J. in *In re Young and Harston's Contract*. (3) It cannot be said that our summons on the question of title was unreasonable, for Neville J. decided in our favour, the Court of Appeal took some days to consider its decision, and the amount at stake was very large. Therefore we have not been guilty of default. The definition of Bowen L.J. referred to default by a vendor, but it has been accepted in all the cases which have been cited, and we submit that it applies to purchasers. The question is whether the purchaser acted reasonably having regard to what he was entitled to do. The vendors must shew that the purchaser's default caused the delay. This they have not done, for up to the decision of the Court of Appeal the purchaser was right, not mistaken, in his view; and in the circumstances his appeal to the House of Lords was reasonable. Secondly, the parties settled an account, and the vendors cannot go behind it: *Laycock v. Pickles* (4); *Dawson v. Remnant* (5); Addison on Contracts, 10th ed. p. 438. It cannot be reopened because there has been a mistake as to legal rights.

*Upjohn, K.C.*, in reply. The purchaser cannot excuse his breach of contract by shewing that he has acted reasonably from his own point of view. The rule laid down in *Flureau v. Thornhill* (6), *Bain v. Fothergill* (7) and *Lock v. Furze* (8), that a vendor of real estate acting in good faith is not liable to the purchaser in damages for loss of bargain where he is unable to perform his contract owing to defect of title,

(1) [1896] 1 Ch. 235.

(2) (1842) Car. & M. 554.

(3) 31 Ch. D. 168, 174.

(4) (1863) 4 B. & S. 497.

(5) (1806) 6 Esp. 24.

(6) (1776) 2 W. Bl. 1078.

(7) (1874) L. R. 7 H. L. 158.

(8) (1866) L. R. 1 C. P. 441, 453.



does not apply in the converse case so as to relieve a purchaser from payment of interest. The burden of proof is on the purchaser to shew that he comes within the proviso which in certain events exempts him from the obligation to pay interest at 5 per cent. He has not discharged that duty, for it is clear that the delay was caused by his appeal to the House of Lords, and that that was not a "cause other than the neglect or default of the purchaser." We could not go on to pay succession duty whilst the appeal was pending and he was repudiating the contract. The authorities shew that the question is one of fact, whether the delay was caused by the default of the vendor or the purchaser. There is no rule that default on the part of the purchaser is not default if his conduct has been reasonable in the circumstances. The authorities which are said to support the rule refer to vendors of real estate, not to purchasers. The expressions used by Stirling L.J. in *Bennett v. Stone* (1) were merely dicta and do not shew any intention to extend the rule to default by purchasers. It is an anomalous rule and will be construed strictly: Fry on Specific Performance, 4th ed. p. 560, par. 1312; Dart on Vendors and Purchasers, 7th ed. vol. ii. p. 996. If the vendor has not acted in good faith he will be liable in damages: *Day v. Singleton*. (2) The position of a vendor of real estate is very different from that of a purchaser. He has many duties to perform which do not fall upon the purchaser whose only duty is to pay the purchase-money. So the question what can be reasonably expected from the parties under the terms of the contract does not apply to the purchaser. Default in this case means breach of contract and does not depend upon reasonableness. Even if the rule does apply to purchasers, this defendant is not within it, for he ought to have been satisfied with the judgment of the Court of Appeal and his appeal to the House of Lords was not reasonable. There was no settled account which could affect this question. Some figures were agreed for the purpose of ascertaining the succession duty, but the vendors' solicitors had no authority or intention to give up any just claims, and there is nothing to shew that any were given up or any consideration given for the settlement:

(1) [1903] 1 Ch. 509.

(2) [1899] 2 Ch. 320.

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*Buckmaster, K.C.*, in reply on the cases.

*Cur. adv. vult.*

March 4. PARKER J. read a judgment as follows: The contract of June 18, 1907, which I have to construe, provided that the sale and purchase thereby contemplated should be completed (in the events that have happened) on September 2, 1907. If not then completed the purchaser was to pay interest at 5 per cent. on his unpaid purchase-money from September 2, 1907, until actual payment. So far the provisions of the contract follow well-known precedents, their effect being that, whatever be the cause of the delay in completion, the vendors were entitled to interest unless it were proved that the delay was due to their own wilful default, in which case they would not be allowed, by insisting on the payment of interest, to take advantage of their own wrong. The contract, however, contains a proviso in the following terms: "Provided always that if the delay in completion shall arise from any cause other than the neglect or default of the purchaser, and if the purchaser shall, at his own risk and expense, deposit the remainder of the purchase-money in any bank upon a deposit account bearing interest, and shall give notice thereof to the vendor, the vendor shall, from the time of such notice, only be entitled to such interest as shall be actually produced by the amount so deposited." The object of this proviso is reasonably clear, but I do not think it is very happily framed. It does not deal, at any rate expressly, with the case of the delay after the date of the notice arising from various causes, each operating during a part only of the total period during which completion is delayed. It might have been better to provide that if the purchaser should make the deposit and give the notice in question, then, for any period after the time of the notice during which the delay should be due to some cause other than the default or neglect of the purchaser, the vendor should be entitled to deposit interest only. I am not sure, however, that this is not the true meaning of the clause.

(1) (1850) 10 C. B. 290.

(2) (1841) 8 M. & W. 140.

(3) (1881) 6 App. Cas. 181.

In the summons the vendors claim to have it declared that they are entitled to interest at 5 per cent. per annum from September 2, 1907, until February 28, 1908, when the remainder of the purchase-money was paid. The purchaser, on the other hand, relies upon the proviso, and further sets up a settled account, in which he was debited with deposit interest only, as a defence to any claim for interest in excess of deposit interest. In order to give the purchaser the benefit of the proviso I must be satisfied that the delay in completion between September 2, 1907, and February 28, 1908, was due to some cause other than the purchaser's default or neglect, it being admitted that he made the proper deposit before, and gave the proper notice on, September 4, 1907. The purchaser contends (1.) that he was not guilty of anything in the nature of default; (2.) that if he was in fact guilty of default, such default was not the cause of the delay in completion. If he fail in these contentions, he relies on the settled account I have already referred to.

The facts of the case are not in dispute. The vendors delivered their abstract of title in due course. On July 15, 1907, the purchaser made an objection going to the root of the vendors' title, and on July 20, 1907, issued an originating summons for a declaration that a good title had not been shewn, and for a return of the deposit with interest and costs, including the costs of investigating the vendors' title—in other words, for all the relief which could be obtained on the footing that the vendors could not by reason of the state of their title fulfil their contract at all. On July 27, 1907, Neville J. decided that the objection taken by the purchaser was a good one, and ordered a return of the deposit with interest and costs as asked by the summons. This order was reversed by the Court of Appeal on October 22, 1907. The purchaser appealed to the House of Lords, and the House of Lords dismissed the appeal on January 30, 1908. On February 4, 1908, the purchaser sent to the vendors' solicitors a draft conveyance, and on February 28, 1908, paid the remainder of his purchase-money into Court and entered into possession of the purchased hereditaments, it being agreed that this was to be without prejudice to the vendors' obligations under a clause of the contract which provided for the commutation of certain duties.

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PARKER J.      The first question I have to determine is whether under these circumstances the purchaser was guilty of any default within the meaning of the contract. Default must, I think, involve either not doing what you ought or doing what you ought not, having regard to your relations with the other parties concerned in the transaction; in other words, it involves the breach of some duty you owe to another or others. It refers to personal conduct and is not the same thing as breach of contract. If A. contracts that B. shall do something by a certain day and B. does not do it by the day named, A. commits a breach of contract; but if the question arises whether the delay be due to A.'s default, A.'s personal conduct has to be considered, and the question will be whether he has committed some breach of his duty towards B. So, in contracts for the sale of real estate providing for completion at a certain date, and containing provisions as to what is to happen if completion be delayed beyond that date by or without the default, or wilful default, of either party, the conduct of that party has to be considered; and if he has been guilty of no breach of duty he will not, I think, be in default within the meaning of the contract. Of course the duties of each party towards the other must be determined by all the circumstances, including the nature of the contract and its provisions; and in determining these duties the complexities of the English law of real property must be borne in mind. The duties of, at any rate, the vendor under a contract for sale of real estate cannot be gauged by the standard applicable to other contracts, for example the sale of goods. Thus the vendor is not in every case bound to know of a defect in his title, but he is bound to remove any such defect if it be pointed out and it is in his power to remove it. If he proceed with diligence to remove it when pointed out, he will not be guilty of default merely because completion has to be delayed pending such removal. If, however, he refuse to remove such defect when pointed out, I think he will be guilty of default, for his duty to the purchaser is to comply with or remove all proper requisitions or objections as to title. On the other hand, though the purchaser is entitled to make all proper requisitions or objections as to title, and to refuse to complete until they have been complied

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with or removed, he owes a duty to the vendor not to refuse to complete on the ground that some untenable requisition or objection made by him has not been complied with or removed; and if he refuse to complete on any such ground he is, I think, guilty of default. There may, of course, be cases in which there is a bona fide dispute as to what is a proper requisition or objection, and the only way of settling such dispute may be by application to the Court. If the Court decide that an objection or requisition is untenable, it in effect decides that it ought not to have been insisted on, and consequently that the purchaser was in default in refusing to complete till it was complied with or removed. If, on the other hand, the Court decide that the requisition or objection was good, it in effect decides that the vendor was in default in not complying with or removing it, if it was in his power so to do. The honest belief of either party in the validity of his own view will not prevent such party being in default, though it may prevent such default being a wilful default within the meaning of the contract in question.

It was, however, argued that this statement of the meaning to be attributed to the word "default" is inconsistent with what is laid down in a series of reported cases to which I was referred, commencing with what is said by Bowen L.J. in *In re Young and Harston's Contract*. (1) On the authority of these cases the purchaser contends that conduct amounting to default must be conduct which is unreasonable, and that there is nothing unreasonable in a purchaser insisting on an objection to title on a point of law so doubtful that the judge of first instance decided in the purchaser's favour, although his decision was subsequently reversed on appeal. Words such as "reasonable" and "unreasonable" of course suggest some standard of conduct, and if the standard be what a prudent man would or would not do for his own protection, I am of opinion that in the present case, having regard to the large amount of the purchase-money and the fact that the objection went to the root of the title, there was nothing unreasonable in the purchaser refusing to complete until the point had been finally decided by the House of Lords. But I do not think that Bowen L.J. really suggests

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(1) 31 Ch. D. 168, 174.

PARKER J. any such standard of conduct. "Default," he says, "means nothing more, nothing less, than not doing what is reasonable under the circumstances—not doing something which you ought to do, having regard to the relations which you occupy towards the other persons interested in the transaction." These words seem to me to imply that what is "reasonable under the circumstances" and what "you ought to do having regard to your relations with others" are one and the same thing. What one man may reasonably be expected to do, or not to do, having regard to the relations subsisting between him and another, is always an important element in determining his duty towards that other. The words of Bowen L.J. do not seem to me to suggest any standard based on what a prudent man might be advised to do, or refrain from doing, for his own protection. In *In re Young and Harston's Contract* (1), as indeed in nearly all the cases to which I was referred, the question was whether the vendor had been guilty of wilful default. It was held that a vendor who went abroad two days before the date fixed for completion, and so was unable to complete on that date, deliberately did an act which he knew, or ought to have known, was inconsistent with the performance of his duty to the purchaser, and was therefore guilty not only of default, but of wilful default.

I propose to examine shortly the subsequent cases in order to see whether they support in any way the purchaser's contention on this point. In *In re Hetling and Merton's Contract* (2) the vendors knew that a difficulty in completion might arise because of the absence abroad of one of two trustees who would be necessary parties to the conveyance, and it was considered apparently bona fide that this difficulty was provided against by a general power of attorney from the absent trustee to his solicitor. The purchaser refused to complete on the ground that the case was not within s. 2 of the Trustee Act, 1888. Completion was thus delayed, and the Court of Appeal, having held that the purchaser's refusal to complete was justified, held further that the vendor had been guilty not only of default, but of wilful default. The vendor knew of the difficulty, and his duty was to provide against it before completion; he made default in this

(1) 31 Ch. D. 168.

(2) [1893] 3 Ch. 269.

duty, and the fact that his default was due to a bona fide mistake of law did not prevent it from being wilful. So far as this decision deals with the meaning of the word "default," I do not think it is affected by any subsequent decision, though, possibly, so far as it deals with the meaning of the word "wilful" it may not be entirely consistent with various subsequent decisions. The case did not turn upon any question as to whether the conduct of the vendor had been reasonable as distinct from the question whether he had failed in some duty he owed the purchaser.

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In *In re Mayor of London and Tubbs' Contract* (1) the vendors misstated their title to part of the property agreed to be sold. It was held by the Court of Appeal that a vendor who takes upon himself to state his title in the contract ought, before doing so, to verify the statement by a proper examination of the documents in his possession. The vendors had not examined their documents at all and were held to have been guilty of default. The majority of the Court held that the default was not wilful, being due to carelessness or oversight. Kay L.J., the dissenting Lord Justice, was of opinion that if the vendors had examined their documents and made a bona fide mistake as to their effect the default would not have been wilful, but that not having examined their documents at all they were guilty of wilful default. It is to be noticed that Lopes L.J. (2), after saying that the vendors might have ascertained the true state of their title by a proper investigation of their documents, and evidently having in mind the passage I have read from Bowen L.J.'s judgment in *In re Young and Harston's Contract* (3), continues in the following words: "It was reasonable in the circumstances that they should have done this: they omitted to do something which it was their duty to have done, having regard to the positive statement they undertook to make, and having regard to their relations with intending purchasers." This seems to me to shew that the Lord Justice interpreted Bowen L.J.'s definition as I have interpreted it.

In *In re Earl of Strafford and Maples* (4) the purchaser made a

(1) [1894] 2 Ch. 524.

(3) 31 Ch. D. 168.

(2) *Ibid.* 537.

(4) [1896] 1 Ch. 235.

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requisition which the vendors refused to comply with. The Court of first instance decided in the purchaser's favour and held that the vendors had been guilty not only of default, but of wilful default, though there was apparently only a bona fide mistake. The decision so far as it related to the requisition was subsequently reversed on appeal, and the vendors, therefore, were ultimately held not to be in default at all.

In *North v. Percival* (1) the vendor refused to complete unless the purchaser adopted his view of the extent of the property contracted to be sold. This view was ultimately held to be wrong, but it was also held that the vendor had not been guilty of wilful default. It is not clear whether the judge thought there had been a default, or whether the real ratio decidendi was not that the bona fide mistake as to the effect of the contract prevented the default from being wilful.

In *In re Woods and Lewis' Contract* (2) the default alleged against the vendor was ignorance at the date of the contract of a flaw in the title which no ordinary care or diligence would have discovered. It was the unanimous opinion of Romer J. and the Court of Appeal that this was not default, in other words, that the vendor's duty was confined to using ordinary care and diligence in matters of title, and there had been no breach of this duty. Collins L.J., in referring to Bowen L.J.'s definition of "default," says that in cases of sales of land the vendor's obligation cannot be measured by the standard applied in the case of sales of goods; in other words, that though default consists in breach of an obligation, the question whether or not there be an obligation must be determined by the nature of the contract and all the circumstances of the case.

Pausing for a moment to consider the effect of these decisions, I think they all point to this, that for default on a vendor's part there must be a breach of some duty towards the purchaser, though in considering whether the vendor was or was not under the duty alleged the Court would be guided by the nature of the contract and all the circumstances of the case. There is no case in which the vendor has been held guilty of a breach of duty and at the same time not guilty of default, although there are cases

(1) [1898] 2 Ch. 128.

(2) [1898] 1 Ch. 433; [1898] 2 Ch. 211.



in which such default has been held not to amount to a wilful default because the vendor was acting under some bona fide mistake as to his rights. There is nothing to suggest that a vendor committing a breach of duty can ever be said to have acted reasonably within the meaning of Bowen L.J.'s definition.

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I pass now to the case of *Bennett v. Stone* (1), on which the purchaser chiefly relied. In that case the vendor insisted on inserting in the conveyance certain words to which the purchaser objected, and the purchaser thereupon instituted an action for specific performance. Buckley J. held that the vendor was wrong, but that inasmuch as his conduct had been due to honest mistake he had not been guilty of wilful default. It is, however, quite clear that he thought there had been a default. After discussing the authorities, he says that in every case where the default was wilful the vendor was doing an act which was not a reasonable act, having regard to his duty to be ready to complete. This seems to introduce some standard of reasonableness for the purpose of testing whether the default is wilful rather than for the purpose of testing whether there be default at all. I gather that the learned judge considered that a refusal to complete due to an honest mistake would not be unreasonable measured by this standard, and, therefore, though a default, would not be a wilful default. Buckley J. further held that the delay in completion was really caused by the conduct of the purchaser. On appeal, Cozens-Hardy L.J. agreed with Buckley J. on both points, Vaughan Williams L.J. dissented from him on both points, and Stirling L.J. dissented from him so far as he held that there had been no wilful default, but agreed with him so far as he held that the delay was due to the conduct of the purchaser. The judgment, therefore, was affirmed. Vaughan Williams L.J. thought the conduct of the vendors did amount to wilful default, that is, as he defines it, a conscious abstention from doing that which reasonably they ought to have done. This again suggests some standard of reasonableness for the purpose of testing whether the default is wilful. The Lord Justice held that in insisting on their own view of the form in

(1) [1902] 1 Ch. 226 ; [1903] 1 Ch. 509.

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which the conveyance ought to be drafted the vendors were guilty of a wilful default, such insistence being unjustifiable under the circumstances. By unjustifiable I think he meant so unreasonable that it could not be justified by any honest mistake. Cozens-Hardy L.J. thought the default on the vendors' part was not wilful because it was due to an honest though mistaken view of their rights in the matter. Stirling L.J. commences his judgment by stating that according to the rule in *In re Young and Harston's Contract* (1) a vendor commits a default if he fails to do something which he ought reasonably to do, regard being had to the terms of the contract which he has entered into with the purchaser. Later he says that it is not every failure to perform the contract which constitutes a default, and further that the circumstances may be such that a vendor does not commit a default in refusing to comply with a requisition or remove an objection made by the purchaser unless or until the Court has determined that the contract puts him under an obligation so to do. He then asks the question whether in the particular case before him the vendors acted reasonably in refusing to accept the purchaser's requirements as to the form of conveyance, and, having answered that question in the negative, on the ground that it really did not matter to the vendors, but was of great importance to the purchaser, how the conveyance was framed, holds that the vendors had been guilty of default, and further that this default was wilful because deliberate. The Lord Justice apparently contemplates that a vendor may refuse to complete his contract on a ground which is untenable, or refuse to comply with a requisition or remove an objection to title which he is bound to comply with or remove, without being guilty of any default at all, provided he acts "reasonably"; and in considering whether the vendors have acted reasonably the importance of the matter to them, or, in other words, their own pecuniary interest, is apparently to be taken into account. Is the matter so important that a vendor, acting as a prudent man, would insist on obtaining the opinion of the Court before proceeding to comply with the purchaser's requisitions, or remove his objections, or accept his form of conveyance? If so there is

(1) 31 Ch. D. 168.

no default. It seems to me that Stirling L.J.'s judgment thus interpreted goes considerably beyond what is laid down in the earlier decisions. Instead of honest mistake preventing a default being wilful it prevents there being any default at all, and if a vendor can without committing a default refuse to comply with a proper requisition or remove a valid objection because there is a doubtful point of law to be determined, it is difficult to see why a purchaser who has at stake an interest at least as great and sometimes far greater than the vendor should not be entitled in a case of doubt to refuse to complete until the Court has determined that the title is good without committing a default. It may, of course, be argued that the considerations applicable to a vendor do not apply to a purchaser. This seems to me a good argument as long as one is considering merely the obligations arising out of the transaction, but if one once allows that a vendor may commit a breach of his obligations to the purchaser without committing a default provided he is acting honestly and with a reasonable view to his own protection, I cannot see why a purchaser should be guilty of default if with the same honesty and a like reasonableness he commits a breach of his obligations to the vendor. In the present case, having regard to the fact that the purchase-money was very large in amount, that the land was required for building purposes, that the purchaser's objection went to the root of the title and raised a difficult point of law, I am not prepared to say that he acted otherwise than honestly and reasonably for his own protection in refusing to complete before the question at issue had been set at rest by the decision of the House of Lords. If, therefore, I were to apply the principle which appears to be laid down in the passages to which I have referred in Stirling L.J.'s judgment, I should have to hold that the purchaser had not been guilty of a default. I do not, however, think that I ought to apply these principles, first, because I am of opinion that a purchaser refusing to complete on the ground that the title is bad, though it is in fact a perfectly good title, is, however wisely he may be acting in his own interest, guilty of default, because he is committing a breach of his duty to the vendor, and, secondly, because I think this view is not only consistent with but is borne out by

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PARKER J. all that is said in the reported cases with the exception of the passages to which I have referred in Stirling L.J.'s judgment; 1909 and it is very possible I am not interpreting these passages correctly, for the Lord Justice evidently is not intending to depart from any earlier case. I hold, therefore, that in the present case the purchaser was guilty of default within the meaning of the contract.

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The next question is whether the delay in completion was due to this default. The purchaser points out that the vendors were under the contract bound to commute or discharge certain duties before the day fixed for completion, and that admittedly they had not commuted or discharged those duties by February 28, 1908. He therefore contends that even if he had raised no objection to title he would not have been bound to complete at any time prior to February 28, 1908. The vendors, on the other hand, argue that when the purchaser on July 20, 1907, issued his originating summons he, in effect, repudiated the contract and relieved them from proceeding with the commutation and discharge of the duties until January 30, 1908, the date of the judgment of the House of Lords, and that after that date they were entitled to the same period during which they could commute or discharge the duties as they would have had if the contract had never been repudiated, that is, a period equal to the interval between July 20 and September 2, 1907. The question is as to the real cause of the delay, and if the conduct of the vendors in not proceeding with the commutation or the discharge of the duties was the natural consequence of the default of the purchaser in insisting on an untenable objection to title, it cannot lie in the purchaser's mouth to say that such conduct was the real cause of the delay. In my opinion the repudiation of the contract by the purchaser relieved the vendors during such time as the purchaser insisted on repudiation from proceeding with their part of the bargain: see *Jones v. Barkley* (1); *Ellis v. Rogers* (2); *Perry v. Smith*. (3) In other words, the conduct of the vendors in this respect was the natural consequence of the repudiation and cannot prevent me from

(1) (1781) 2 Doug. 684.

(2) (1885) 29 Ch. D. 661.

(3) Car. &amp; M. 554.



holding that the repudiation was the real cause of the delay in completion. PARKER J.

It was said, however, that by no possibility could the vendors have commuted the duties by September 2, seeing that they actually took from January 30, 1908, till September in the same year in arranging for such commutation. I do not consider that it is open to the Court to speculate on what would have happened if the purchaser had not been guilty of default, and I am far from satisfied that if I did enter on such a speculation I should arrive at the conclusion that the duties would not have been commuted or discharged before the day fixed for completion. There are all manner of considerations which might be material on the point. To take one example only, the pressure of business in the Revenue Department between July 20 and September 2 could not be disregarded. I have come to the conclusion, therefore, not only that there was a default on the purchaser's part, but that such default was the real cause of the delay in completion between September 2, 1907, and February 28, 1908.

The last question which arises is as to the alleged settled account. I am not clear that this point is, strictly speaking, one which should be raised on a vendor and purchaser summons, but evidence has been filed upon it and both parties desire me to deal with it. The point really is whether in an action by the vendors for the interest contracted to be paid the settled account in question would be a good defence. It is to be observed that this account though stated was not settled by payment of the balance appearing to be due, and if it be a defence to an action on the contract, it can only be on the ground that it amounts to an agreement compromising disputed cross-claims so that the original right of action on the agreement has been satisfied, or, as is sometimes said, merged in the account: see *Callander v. Howard*. (1) It was prepared in view of an application to the Master in Lunacy and in order to inform the Master of the position of the parties under the contract. It was not prepared with the object of settling disputed cross-claims between the parties. Indeed at the time it was prepared the present point

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(1) 10 C. B. 290.

PARKER J. had not arisen, the vendors' solicitors having assumed throughout that only the deposit interest was payable. Further, even when an account is stated and the balance paid, it can be opened on the ground of a mistake such as this—see *Daniell v. Sinclair* (1) and *Thomas v. Hawkes* (2)—unless of course it be stated as the result of a compromise of disputed cross-claims. Under all the circumstances, therefore, I am of opinion that the account in question would be no defence to an action for the payment of the interest, and I so hold.

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Solicitors: *Woodcock Ryland & Parker, for Brooks, Marshall & Hall, Manchester; Sharpe, Pritchard & Co., for North, Kirk & Co., Liverpool.*

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Where title is founded on an adverse possession, the title will be limited to that area of which actual possession has been enjoyed, and, as a general rule, constructive possession of a wider area will only be inferred from actual possession of the limited area, if the inference of such wider possession is necessary to give effect to contractual obligations, or to preserve the good faith and honesty of a bargain.

The plaintiffs, who were together entitled to one undivided one-sixth part of the mines under a mountain of ninety-two acres, brought an action against the defendant, who was admittedly entitled to another undivided one-sixth part of the same mines, and asked for an account of the coal worked by him. It was proved in evidence that more than twelve years before the commencement of the action the predecessors in title of the defendant, under licences from the owners of the other four-sixths of the mines, but without the licence of the plaintiffs, had commenced to work out the coal under the mountain from an area of two acres, and had remained in possession of that worked-out area, or cavity, ever since. The defendant claimed that possession of part of the mine

(1) 6 App. Cas. 181.

(2) 8 M. & W. 140.

entitled him to constructive possession of the whole area of the mine horizontally and vertically under the mountain :—

*Held*, that the defendant, having been in adverse possession of the plaintiffs' one-sixth part, which must be treated as a separate tenement, for more than the required statutory period, had acquired a good title under the Statute of Limitations to the two-acre area, of which his predecessors had been in actual possession, and no more.

*Held*, therefore, that the plaintiffs were entitled to an account of the coal, except that taken from the two-acre area, such account to be limited to six years before action brought.

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THE plaintiffs in the action, Sir Gervas Powell Glyn and John Picton Turbervill, claimed a declaration of the title of each of them, as tenants for life in possession, to one equal undivided twelfth part or share in the mines and minerals under a tract of land of some ninety-two acres, known as the Argoed mountain, situate in the parish of Llangynoyd, in the county of Glamorgan, and for an account of rents, royalties, and profits received by the defendant. By the statement of claim the plaintiffs alleged that the Reverend Gervas Powell, who died in the year 1795, was at the date of his death seised in fee of a farm and lands called Ty Canol Farm, comprising some twenty-eight acres of land, and of an equal undivided third in the mountain called Argoed Afon, on which the farm abutted. By his will, dated April 3, 1787, Gervas Powell gave, by implication, all his real estates in the county of Glamorgan to his four daughters in fee simple as tenants in common.

The testator left surviving him four daughters, Elizabeth, Johanna, Margaret, and Catherine. The plaintiffs claimed title through Catherine and Elizabeth, and the defendant Llewellyn Howell (since deceased and represented by his surviving executor, Llewellyn John Howell) claimed through the other two daughters. By a partition deed dated April 7, 1802, the hereditaments of which Gervas Powell died seised, so far as regards the surface thereof, were partitioned amongst his four daughters, the surface of Ty Canol Farm, which included the undivided third in the Argoed mountain, being allotted and conveyed in severalty to Margaret Powell as part of her share. But there were saved, excepted, and reserved from the operation of the partition deed all mines, minerals, and quarries under any of the lands, estates,

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or premises thereby intended to be conveyed, together with all necessary powers of ingress, egress, and regress. The object of the plaintiffs' action was to establish their claim to a share in the mountain minerals. The defendant claimed to be entitled to the entirety of the undivided one-third part of the mines under the mountain by purchase from the owner of Ty Canol Farm and to be working the minerals by virtue of this title and under licences from the owners of the other two-thirds of the coal. The plaintiffs admitted that the defendant was entitled to one-sixth part of the minerals under the mountain, and alleged that his original title thereto down to the partition deed of 1802 was the same as that of the plaintiffs. By way of defence the defendant denied that the plaintiffs had any interest in the minerals in question, and pleaded the Statute of Limitations as a bar to the plaintiffs' action.

Evidence of the plaintiffs' title was first adduced. There was also evidence that the mines under the mountain had been worked by Llewellyn Howell and David Rees (predecessors of the defendant) under an agreement of May 26, 1887, whereby the then owner of Ty Canol Farm sold to them his interest in the mines under the mountain. They entered on the undivided part on September 1, 1889, and, although interrupted in working for some months by the finding of a fault, they remained in continuous possession of the levels from which the coal had been worked.

The plaintiffs' action was brought on July 27, 1908. The proved facts as to the working of the mines, and the conclusion drawn therefrom by the judge, sufficiently appear from the judgment.

*Uppjohn, K.C.*, and *R. Rowlands*, for the plaintiffs. The plaintiffs have established, on the deeds and evidence, a good title to the one-sixth of the mines.

[This portion of the case does not call for any detailed report.]

*Jessel, K.C.*, and *A. J. David*, for the defendant. There is no question about the defendant's having been lawfully in possession; he was himself entitled in his own right to one-sixth, and



he had the consent of the owners of the other two-thirds. He was working the upper seams in a certain area, and he claims to have acquired a title under the Statute of Limitations not only to that area and the minerals in the deep seams beneath it, but also to the mines and minerals under the whole area of the mountain.

A wrong-doer does not get a title to mines by prescription unless he can work the whole mine: *Ashton v. Stock*. (1) The defendant was not a trespasser or a wrong-doer, but a co-owner, and any co-owner may enter and work: *Job v. Potton* (2); and the possession of one co-owner has, since the Real Property Limitation Act, been deemed to be the ouster of the other. A person who lawfully enters and works mines is deemed to be working the whole: *Taylor v. Parry* (3); *Davis v. Shepherd*. (4) Those were cases of lessees and are distinguishable on that ground from the class of cases of which *Ashton v. Stock* (1) and *Thompson v. Hickman* (5) are examples, in which the defendant was a trespasser. Sect. 12 of the Real Property Limitation Act, 1833 (6), is a very strong provision to negative the claim of the plaintiffs. *In re Hobbs* (7) is an illustration of title under that section. We rely on that section and on the defendant's lawful working to say that he has acquired a title to the whole of the mines; and the fact that there may be a succession of seams, one below the other, ought not to have any bearing on the legal rights of the parties in such a case as this. Supposing that a trespasser came and took the deep seams in this

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(1) (1877) 6 Ch. D. 719.

(2) (1875) L. R. 20 Eq. 84.

(3) (1840) 1 Scott, N. R. 576.

(4) (1866) L. R. 1 Ch. 410.

(5) [1907] 1 Ch. 550.

(6) Real Property Limitation Act, 1833 (3 &amp; 4 Will. 4, c. 27):

Sect. 12. "And be it further enacted, that when any one or more of several persons entitled to any land or rent as coparceners, joint tenants, or tenants in common, shall have been in possession or receipt of

the entirety, or more than his or their undivided share or shares of such land, or of the profits thereof, or of such rent, for his or their own benefit, or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have been the possession or receipt of or by such last-mentioned person or persons or any of them."

(7) (1887) 36 Ch. D. 553.

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case, we submit that the defendant could eject him, because, having worked the upper seam, the Court would presume that he was the owner of the entirety; otherwise no owner of the seams adjoining the surface could at any time use his deep seams without shewing a paper title.

*Davis v. Shepherd* (1) was followed in *Low Moor Co. v. Stanley Coal Co.* (2), which is not such a strong case as this, because this defendant had more title to be in possession than the defendant in that case.

*Bulli Coal Mining Co. v. Osborne* (3) was a case of trespass, and the Court's reluctance to allow the Statute of Limitations to be a defence in that case, though very strong, was because it was a case of trespass. We submit that the cases cited establish the proposition that it is only as against a trespasser, and not as against a true owner, that the Court will assume that the working of one seam does not involve the ownership of the other seams.

[EVE J. Is there any case which limits the area of which possession is acquired by working a small piece?]

No. We do not think so. It ought not to be so.

*Upjohn, K.C.*, in reply. On the evidence it is submitted that within the twelve years from the action being brought there was an abandonment of the working in the undivided coal mines which prevents the operation of the Statute of Limitations.

An action of trespass does lie by one tenant in common against another: *Goodtitle v. Toms*. (4) From 1889 to 1891 the defendant's predecessor was destroying the common property. Before the statute can run there must be wrongful possession, and for the whole period without intermission: *Trustees, Executors and Agency Co. v. Short*. (5)

The statute ceases to run when the intruder relinquishes possession. Unless the defendant was in wrongful possession the Real Property Limitation Act, 1833, does not apply at all. The defendant must rely upon s. 12 of that statute, and the undivided share belonging to the plaintiffs must be treated as a separate tenement, of which he was in wrongful possession. He

(1) L. R. 1 Ch. 410.

(2) (1875) 33 L. T. 436; on appeal,  
(1876) 34 L. T. 186.

(3) [1899] A. C. 351.

(4) (1770) 3 Wils. 118.

(5) (1888) 13 App. Cas. 793.

was in lawful possession of his own undivided one-sixth, but he was an intruder or "spoliator" as to the other one-sixth, and therefore no presumption will be made in his favour: *Culley v. Doe* (1); *M'Donnell v. M'Kinty* (2), where it was held that a user and possession of part of certain quarries by a grantee of the lands would not justify a presumption of the possession of the whole. *Smith v. Lloyd* (3) also shews that there must be continuity of possession, and here there was a break, so the plea of the Statute of Limitations fails.

But if the Court should hold that the defendant has had possession of the two-acre area for such a period as to give him a statutory title to the plaintiffs' one-sixth share, then it is submitted that all he has acquired a title to is just the place of which he had actual possession, and no more. The proposition of law which the cases support is this: that if the person who claims to have acquired a statutory title was put in possession of a portion of coal by the lawful owner of the whole of the seams (the title to which is in question) with the intention of giving that person possession of all the seams, then the law will give effect to the intention of the lawful owner and will hold the person who has actual possession of a part of one seam only to be in constructive possession of more, for the purpose of protecting the rightful title against a wrong-doer; but where the person who claims the title is himself a wrong-doer, the law will not recognize any title on his part beyond the ambit of his actual possession. In other words, the law will make a presumption in favour of a lawful owner against a wrong-doer, but not in favour of a wrong-doer against a rightful owner: *Earl of Dartmouth v. Spittle* (4); *Ashton v. Stock* (5); *Thompson v. Hickman* (6); *Murphy v. Murphy* (7); *Tidball v. James* (8); *Thornton v. France*. (9) There are cases where constructive possession is allowed by the law. The doctrine is laid down in general terms by Lord Watson in the case of *Lord Advocate v. Wemyss* (10), where he says that "a

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(1) (1840) 11 Ad. & E. 1008.

(2) (1847) 10 Ir. L. Rep. 514.

(3) (1854) 9 Ex. 562.

(4) (1871) 24 L. T. 67.

(5) 6 Ch. D. 719.

(6) [1907] 1 Ch. 550.

(7) (1864) 15 Ir. C. L. Rep. 205.

(8) (1859) 29 L. J. (Ex.) 91.

(9) [1897] 2 Q. B. 143.

(10) [1900] A. C. 48, 68.

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much more liberal effect has been given to partial acts of possession as evidencing proprietary possession of the whole, in cases where the subject of controversy has been in itself a distinct and definite tenement." The point is put in a more concrete way by Lord Cranworth in the case of *Davis v. Shepherd*. (1) The principle of those cases was adopted in *Low Moor Co. v. Stanley Coal Co.* (2), where a presumption was made in favour of the lawful owner against a wrong-doer. The Statute of Limitations was not applied there in favour of a trespasser, but of one who, in equity, was the absolute beneficial owner of the whole of the seams of coal. The case of *Taylor v. Parry* (3) goes on the same lines. In the case of *Job v. Potton* (4) a third part of the coal in a seam was left ungotten for the owner of that part to take, so the worker of the two-thirds, to which he was lawfully entitled, could not be regarded as a trespasser. That shews what the real character of the defendant in the present case was, namely, that of a trespasser as to the one-sixth part, as he has taken the whole of the coal in the seams which he worked.

*Jessel, K.C.*, in rejoinder upon new cases cited, referred, inter alia, to *Jacobs v. Seward* (5) for the proposition that when a man has worked coal he is not to be regarded as a trespasser unless there has been what amounts to a forcible ouster of the rightful owner. Any tenant in common of a mine can work any portion of it subject to an account. The plaintiff is not seeking to stop the working by injunction, nor can he do so.

EVE J. (after stating the effect of the pleadings). I think the facts and the law of the case conveniently fall under three headings—first, the title of the plaintiffs as proved in the action; secondly, the acts of the defendant and his predecessors upon which he relies for the purpose of establishing a title under the statute; and, thirdly and most important, the legal result of the acts which the defendant has established. [His Lordship then dealt with the first heading and held, on the evidence, that the plaintiffs had established a good paper title in each of them to

(1) L. R. 1 Ch. 410 415.

(3) (1840) 1 Man. & G. 604.

(2) 34 L. T. 186.

(4) L. R. 20 Eq. 84.

(5) (1872) L. R. 5 H. L. 464.



one-twelfth of the disputed minerals, and, further, that the defendant's title was a title common to them and the plaintiffs down to the year 1802 and continued :—] Now, with regard to the second heading, all the facts are now fairly well ascertained and so far as they are material can be stated in this manner. In 1887 two men, Howell and Rees, having conceived the idea of working coal in the neighbourhood of the Argoed mountain, set about acquiring an interest in the coal; having acquired licences from the owners of four-sixths of the coal under the mountain, they resorted to the then owner of Ty Canol Farm, and in May, 1887, they entered into an agreement with him under which he sold or agreed to sell to them his undivided share of the mines and minerals under the mountain. They further entered into some arrangement, the nature of which it is not necessary to consider in detail, with a Miss Talbot, under which they were to drive a level under her land, and extract coal from under her land, and by means of this level they contemplated opening up the coal measures, or some of the coal measures, under the Argoed mountain. Having entered into this agreement with the owner of Ty Canol Farm and paid him the purchase-money, it appears from the evidence of one of the miners who was called that, either in the latter part of 1887 or early in 1888, they commenced to drive the level under Miss Talbot's land in a northerly direction towards the Argoed mountain. It is only necessary with regard to the arrangement with Miss Talbot to state that they were to pay her a royalty of 6*d.* a ton in respect of coal extracted from under her land, and they were further to pay her a way-leave of 1*d.* per ton per mile for all foreign coal brought to the surface by means of the level driven through or under her land; at all material times for the purpose of this case, the only foreign coal subject to that way-leave was coal brought from under the Argoed mountain. The level was driven and in the second quarter of 1889 reached the coal, or the boundary of the coal, lying under the Argoed mountain. Shortly before entering upon that coal the lessees found a fault. The fault took them some time to get through, and having got through it, instead of proceeding with the level in a northerly direction, they turned so as to follow the face of the coal in an easterly direction, and by September 1, 1889, having pierced

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the fault, they had excavated a small quantity of Miss Talbot's coal which lay to the north of the fault, and had taken the turn which brought them into the coal under the Argoed mountain, that is to say, into the coal in dispute. From September, 1889, or possibly from a slightly earlier date, when they so entered upon the coal measures under the Argoed mountain, continuously down to the early part of 1892, they were withdrawing coal from under the Argoed mountain, carrying it to the surface through the level under Miss Talbot's land, and paying to her a way-leave in respect of that coal. From the returns made quarterly and checked by Miss Talbot's agent it is conclusively established that foreign coal was worked and brought to the surface for a period which commenced at a date antecedent to Midsummer, 1889, and which extended down to Midsummer, 1892. But then the action was brought in the month of July, 1903, and it is obvious that the second date down to which foreign coal was being drawn through the level was a date less than twelve years before the commencement of this action, and accordingly it is necessary to eliminate from consideration that portion of the period to which I have referred which fell within twelve years before the date of the issue of the writ in the action. The material date which I have to consider is July 27, 1891. What was the position with regard to the workings under the Argoed mountain in July, 1891?

Here I have a document which, at any rate in parts, came into existence simultaneously with the workings. I am referring to Mr. David Rees' plan, on which there is a date written in ink by Mr. Rees himself of August 5, 1891, and he says that is the date at which, having failed to get through a further fault which had been met with in the level, the defendant's predecessor turned back from the face of the fault and proceeded to extract and take down some of the pillars which had been left standing in the level as they were working forward. It is not necessary for me to consider the extent to which or the time over which the taking back of the pillars was going on, but this much I am quite satisfied upon, that the defendant's predecessors had in fact worked up to the face of the second fault at a date more than twelve years before the institution of this action. And this further, I think, is the fact, that after they had turned back from

the face of the fault they were engaged for the best part of nine months in extracting from the level such pillars as could safely be removed and yet leave the level available for other purposes ; and when the last pillar was abstracted prior to Midsummer, 1892, the only purposes for which the level continued to be used were partly as a drainage way, but chiefly as an air way for ventilating the lower works in the colliery. The result, therefore, is that the defendant's predecessors were in possession of the minerals and of the cavity from which the minerals were extracted under the Argoed mountain to the extent shewn on Mr. Rees' plan, at a time which was more than twelve years before the commencement of this action. I further think, upon the evidence, that I must treat it that the defendant's predecessors have remained in possession of that cavity ever since. It seems to me that when the coal was there, and they were abstracting the whole of the coal, they were in possession of the whole seam, and that when the site which had theretofore been occupied by so much of the coal as represented the undivided interests of the respective plaintiffs therein was cleared of the coal, they still remained in possession of that site or cavity. In my view the true inference to be drawn from the facts that I have stated is that the defendant has acquired a good statutory title by adverse possession to the area which has been described as the two-acre area, lying for all practical purposes between the two faults.

That, I think, leads me to the third and more difficult question. What is the proper legal result of that possession ? Does it, as Mr. Upjohn suggests, give to the defendant a title only to that of which he or his predecessors have had actual possession, or does it, as Mr. Jessel and Mr. David urge, operate to give him a title not only to that of which he had actual possession, but to the whole area of the coal lying horizontally and vertically under the Argoed mountain ? That, I confess, is a question which causes me some difficulty. Mr. Jessel says, and indeed he is bound to say, upon the assumption which I have now made against him that the plaintiffs have made out a good paper title, "I can only claim a title paramount to that title by a possessory title arising under s. 12 of the statute of 1833." That section, so far as it is necessary for the purposes of this

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case, is in these words: "When any one or more of several persons entitled to any land as tenants in common, shall have been in possession of the entirety, or more than his or their undivided share or shares of such land for his or their own benefit, such possession shall not be deemed to have been the possession of the last-mentioned person or persons or any of them." The "last-mentioned person or persons" refers to the person or persons "entitled to the other share or shares of the same land." Mr. Jessel says: "Having been in possession of this two-acre tract, and having obviously gone into possession of it with a view to taking possession of my own undivided one-sixth, and intending therefore to exercise all those rights of ownership which would flow from my being in possession, I must be treated as having been in possession of your undivided shares in the same character and to the same extent as I was in possession of my own undivided sixth, and when I go into possession of minerals under a piece of land which belongs to me, the proper and only assumption is that I take possession of the mines laterally and vertically under the whole surface of that piece of land." He says that I ought to attribute the same result to the possession of the undivided sixth which did not belong to him in the first instance as I attribute to the possession of the undivided sixth which all parties admit did belong to him, and that I am not entitled to draw one presumption with regard to one of those interests and another presumption with regard to the other. He further says this: "You cannot treat me as a trespasser or as a spoliator in respect of the undivided sixth, because in fact I was entitled, having regard to my interest in the property, to go and remove the subject-matter of that which I hold as tenant in common in undivided sixths, and being there, exercising my legal right in removing the coal, the Court will presume in my favour those results which flow from the possession of a man who is rightfully in possession." For the purpose of my decision I will assume that Mr. Jessel is right when he says that one tenant in common of a coal mine can go into the mine and remove the whole of the coal, subject always, of course, to any proceedings by way of entry which the other co-tenants may take. I am not deciding



that; it is a matter which may want further consideration, because, in the only case in which the matter has been dealt with, and in which certainly language was used by the learned judge going to support Mr. Jessel's contention, it is to be observed that the tenants in common of two undivided thirds, through their lessee, had in fact only removed two-thirds of the coal, leaving one-third remaining in situ. It is quite obvious from the report of the case to which I am referring, *Job v. Potton* (1), that the lessee, working under a licence from the owners of two-thirds of the coal, had in the course of his working been careful only to remove the two-thirds of which he was licensee, and that he had left in situ what he considered was equivalent to one-third of the coal which he had encountered, and, therefore, under the particular facts of *Job v. Potton* (1) the point which has been argued in this case did not arise. It may be that the matter is still open and may have to be determined on some future date, but for the purposes of my judgment here I will assume that the defendant's predecessor, as one tenant in common, was acting within his rights in entering upon and removing the whole of the coal, and that the other owners either stood by and allowed him to do it, or, unconscious of their rights or of their title until recent times, have allowed a length of time to elapse which precludes them now from making any claim in respect to the coal so removed. But it appears to me, even making that assumption in Mr. Jessel's favour, that I cannot accede to his argument that in that respect his possession of the undivided one-sixth, which did not at that time belong to him, was a lawful possession. I think, in order to bring the statute into operation, one must treat the possession as an unlawful one, and one which only fructifies into a lawful possession when the statutory period has elapsed, and, therefore, in relation to his co-tenant, it seems to me I must treat the tenant in common, who was in possession of the entirety, as being in the same position as if he were a stranger in possession of a separate tenement, so far as regards the undivided interest of his co-tenant. If that be so, the question is whether a person so situated is entitled to have presumed in his favour a possession

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which goes far beyond the ambit of that of which he is in actual possession? In other words, ought I to treat him as constructively in possession of a wide area, both lateral and vertical, of which in fact he has not got and never has had the actual possession? The line of authorities which Mr. Upjohn has relied upon, commencing, I think, with *Earl of Dartmouth v. Spittle* (1) and coming down to the case of *Thompson v. Hickman* (2), seems to me to establish that where title is founded on an adverse possession the title will be limited to that area of which actual possession has been enjoyed, and that as a general rule constructive possession of a wider area will only be inferred from actual possession of the limited area, if the inference of such wider possession is necessary in order to give effect to contractual obligations, or to preserve the good faith and honesty of a bargain. Here the defendant's case is—and it is the only way in which his case can be put—"I have been in possession of your property for a period which now gives me a statutory title to that property," and, in my opinion, the proper legal presumption to make is that he has acquired that legal title to the property so far only as he has been in actual possession. There is no obligation, and, indeed, it would be contrary to the line of authorities to which I have already made reference, to hold that that possession operates to give to the person who has enjoyed it possession of that of which he has never in fact been in possession. I think Mr. Upjohn is right when he says the decisions have proceeded upon two lines, the one being those cases where the possession of the part has been treated as possession of the whole, because the Court has found, either by contract or according to conscience, that possession of the whole is what the person possessed of the part was intended to have, and the other being those cases in which the Court, finding no just reason for inferring, in favour of a person relying solely on possession of a part, a constructive possession of the whole, has refused to make such inference.

I hold that this case falls within the latter of the two classes referred to, and in my opinion the defendant has acquired a statutory title to that of which his predecessors were in actual

(1) 24 L. T. 67.

(2) [1907] 1 Ch. 550.

possession in 1889, 1890, and 1891, and no more—that is to say, to the area which has been referred to as the two-acre area.

It remains, therefore, for me to declare the title of the plaintiffs to the subject-matter of the dispute, with an exception which must be carefully framed so as to reserve to the defendant the title to that cavity which was formerly filled with the coal which his predecessors abstracted; and, having made that declaration, I must direct a properly framed inquiry as to the coal which has been abstracted by the defendant or his predecessors from the area other than the excepted area, and I must direct an account in respect of this coal commencing from a date six years antecedent to the issue of the writ in the action.

With regard to the costs, I think, under the circumstances, that justice will be done if I direct the defendant to pay two-thirds of the plaintiffs' costs of the action. I make no order with regard to the remaining one-third.

Solicitors: *Wrentmore & Son, for Frank James & Sons, Cardiff;*  
*W. H. Martin & Co., for David & Evans, Cardiff.*

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[1908 P. 826.]

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*Restrictive Covenant—Freehold Land—Building—Covenant “for himself his executors administrators and assigns” —Meaning of Covenant—Plans to be first submitted—Negative Character of Covenant—Breach by Covenantor’s Lessee—Determination of Lease—Re-entry of Covenantor—Liability for Breach by his Assigns—Not a Continuing Breach—Nature and Extent of Covenant—“Outbuilding”—Obligation to submit Plans—Incidence.*

By a deed of conveyance, dated June 24, 1904, of part of a building estate the defendant, who was the purchaser, covenanted “for himself his executors administrators and assigns” with Ball (the owner of the estate), his heirs and assigns, that he would (inter alia) erect on the land conveyed private residences only (with suitable outbuildings to be erected at the rear thereof), and that he would before the commencement of the erection of any building submit the plans thereof to Ball, his heirs and assigns, for his or their approval. Ball afterwards conveyed Lenton Hall, part of the land retained by him, to Bond in fee simple together with the benefit of the defendant’s covenants. The defendant demised his land to lessees subject to the stipulations and conditions in the deed of June 24, 1904, and the lessees entered into covenants with him as to submission of plans and building similar to those in the same deed. The lessees commenced to build a house without having submitted plans to Bond or obtained his approval thereof, and they also erected an outside building, containing a water-closet, built on and attached to the front end of the house and not accessible from the inside of the house. The defendant had seen plans of the house and was cognisant of its erection. Bond took objection that the house was being erected in breach of covenant, and the lessees stopped building. On the subsequent disclaimer of the lease by their trustee in bankruptcy, the defendant re-entered upon the demised land with the unfinished house upon it. In the meantime Bond had conveyed Lenton Hall to the plaintiff in fee simple with the benefit of the defendant’s covenants. The plaintiff thereupon commenced this action for (inter alia) an order directing the defendant to pull down and remove the house in question, the plaintiff alleging depreciation in the value of his property from the proximity of the unsightly and unfinished house which was visible from all the principal rooms of Lenton Hall:—

*Held*, (1.) that the covenant to submit plans before the commencement of building involved a negative contract that no buildings should be commenced until plans had been submitted to and approved by the grantor, his heirs and assigns, and that in this respect the erection of the house was a breach of covenant; and (2.) that the water-closet was



an outbuilding within the meaning of the covenant, and that its erection was, in the circumstances, a breach of the covenant as to the position of outbuildings; but

*Held*, further, that the defendant was not liable to pull down and remove the house, on the following grounds:—

(1.) That there was no continuing breach, the covenant having been broken once and for all when the house was erected contrary to it: *Doe v. Woodbridge*, (1829) 9 B. & C. 376, followed;

(2.) That the breach was committed, not by the defendant, but by his lessees, and that the defendant had not by his conduct rendered himself liable for the violation of the covenant: *Hall v. Ewin*, (1887) 37 Ch. D. 74, applied; and

(3.) That in the covenant by the defendant the words “for himself his executors administrators and assigns” were used to indicate the intention that the covenants should run with the land, and not to impose on the covenantor liability for the acts of his assigns.

Upon the strict construction of the covenant, the obligation to submit plans for the approval of the covenantee lay on the defendant, notwithstanding the lease, but in any action founded on a breach of that covenant the plaintiff would only be entitled to nominal damages, and not to any such order as was claimed in the action.

#### WITNESS ACTION.

In June, 1904, the defendant purchased from one Ball, the owner of the Lenton Hall estate, which had been laid out as a building estate for residential houses of good quality, a portion of the estate containing 9664 square yards and situate in the rear of other land belonging to the defendant and also forming part of the Lenton Hall estate.

The portion in question was conveyed by Ball to the defendant by a deed of conveyance dated June 24, 1904, containing certain mutual covenants by the vendor and purchaser restrictive of building on the land sold and the land retained so far as it fronted on to a proposed new road. The land retained by Ball included Lenton Hall and about seven and a half acres occupied therewith. The deed also contained a covenant by the defendant, for himself, his executors, administrators, and assigns, with Ball, his heirs, executors, administrators, and assigns, (*inter alia*) that he would erect on the piece of land thereby conveyed no buildings other than private residences (with suitable outbuildings to be erected at the rear thereof), and that each residence should have not less than half an acre attached thereto, and also that he would before the commencement of the erection of any building

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submit the plans thereof to Ball, his heirs and assigns, for his or their approval, but such approval should not be arbitrarily withheld.

By a conveyance dated November 28, 1904, Ball conveyed Lenton Hall to G. C. Bond in fee simple together with the benefit of the defendant's covenants contained in the conveyance of June 24, 1904.

On March 9, 1906, the defendant demised the land comprised in the conveyance of June 24, 1904, to W. Taylor and J. Fletcher for a term of 250 years from January 1, 1906, subject to such of the obligations, stipulations, and conditions contained in the deed of June 24, 1904, as were still subsisting, and the lessees thereby covenanted to observe and perform the same and to indemnify the defendant against the same and for or in respect of any future breach thereof, and also to erect one detached dwelling-house on the demised land according to plans to be approved and signed by the lessor prior to commencement. The lessees also entered into covenants as to the buildings to be erected and the user thereof similar to those in the deed of June 24, 1904.

At the date of the lease Taylor and Fletcher were in possession of the demised land and were engaged in erecting thereon the house in dispute in this action. The defendant was shewn the plans of the house early in 1906, and was from time to time on the site and saw the work in progress from its commencement until it was abandoned. No plans of the house were ever submitted to or approved by Bond or any one on his behalf. In March, 1906, Bond, who had some previous knowledge that building was going on, came to the conclusion that the house was being erected in breach of covenant and communicated with the lessees, with the result that the latter gave an undertaking not to proceed further with the work pending a settlement between them and Bond.

Before the outstanding dispute was settled Taylor and Fletcher were adjudicated bankrupt. On June 8, 1907, the trustee in their bankruptcy served the defendant with notice of his intention to disclaim the lease of March 9, 1906, and on August 10, 1908, filed his disclaimer thereof, the defendant having in the

meantime entered into possession of the land with the unfinished house upon it.

By a conveyance dated July 6, 1907, Lenton Hall was conveyed by Bond and his mortgagees to the plaintiff in fee simple together with the benefit of the defendant's covenants contained in the conveyance of June 24, 1904. The plaintiff thereupon approached the defendant with a view to getting the unfinished and unsightly house removed. It was situate about 420 feet from Lenton Hall, was visible from all the principal rooms, and in part overlooked the garden and pleasure grounds. The defendant submitted plans to the plaintiff for pulling down the upper floors and converting the remainder into a cottage for one of his outdoor servants, but the plaintiff declined to approve the plans. The negotiations between the parties having failed, and the defendant refusing to remove the structure, the plaintiff commenced this action, alleging that the erection and retention of the house in question constituted breaches of the defendant's covenants and seriously depreciated the value of Lenton Hall, and claiming an injunction to restrain the defendant from erecting or continuing to erect any building on the land in breach of the covenants in the deed of June 24, 1904; an order directing the defendant forthwith to pull down and remove the buildings erected in breach of those covenants; and damages.

Besides the alleged breach of covenant by the non-submission of plans before the commencement of building, the plaintiff complained that a breach of the building stipulations relating to outbuildings had been committed by the erection of an outside building, containing a water-closet, built on and attached to the front end of the house, but with no access from the interior of the house and with its door fronting towards the proposed new road.

*P. O. Lawrence, K.C.*, and *Dighton Pollock*, for the plaintiff. With regard to the construction of the covenant in the deed of June 24, 1904, our contention is that it means that no building shall be commenced on the land without plans being first submitted for approval to Ball, his heirs and assigns, and being duly approved. The covenant is in substance a negative one, although apparently affirmative: *Metropolitan Electric Supply Co. v.*

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*Ginder*. (1) Once there is equitable jurisdiction established, the Court is strong enough to enforce the covenant by injunction.

The defendant here is bound at law under the covenant, which was not the case in *Hall v. Ewin*. (2) The breach is a continuing one for which a mandatory injunction can be granted: *Gaskin v. Balls* (3); *Baxter v. Bower* (4); *Attorney-General v. Metcalf & Greig*. (5) The plaintiff is therefore entitled to the mandatory injunction which he claims.

*Jessel, K.C.*, and *Marcy*, for the defendant. The defendant has not been guilty, as we submit, of any breach of covenant. The building in question was erected by a tenant after the defendant had parted with his interest. The site has since come back to the defendant involuntarily, the effect of the disclaimer by the trustee in bankruptcy having been to accelerate the reversion: *In re Finley* (6); Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 55, sub-s. 2. There is no equity which compels the defendant to pull the building down, and in order to make him liable for a breach of covenant by a third party the plaintiff must shew that the defendant actually induced the breach, which he has not done.

We submit that the erection of the closet was not a breach of the covenant relating to outbuildings. It is not detached from the main building and is not an outbuilding within the meaning of the covenant. The terms "house" and "outhouse" were discussed in *Elsmore v. Inhabitants of St. Briavells Hundred*. (7) The breach of the covenant relating to the previous approval of plans was committed once and for all upon the commencement of the building by the defendant's lessees, and the defendant is not liable for their breach.

Further, we submit that the defendant is not liable to pull down this building. The covenant by the defendant "for himself his executors administrators and assigns" may make the covenant run with the land, but is not a warranty by the defendant that his assigns will perform the covenant. He is not liable for what they do: *Kemp v. Bird*. (8) There was in

(1) [1901] 2 Ch. 799

(2) 37 Ch. D. 74.

(3) (1879) 13 Ch. D. 324.

(4) (1875) 23 W. R. 805.

(5) [1908] 1 Ch. 327.

(6) (1888) 21 Q. B. D. 475, 485.

(7) (1828) 8 B. &amp; C. 461.

(8) (1877) 5 Ch. D. 974.



fact no breach by the defendant, and such breach as there has been is not a continuing breach. There was only one breach, and that was the commencement of the building by the defendant's lessees without the submission to and approval of plans by Bond : *Jacob v. Down*. (1) Even if a covenant to submit plans can be twisted into a restrictive covenant, there is no continuing breach : *Walrond v. Hawkins*. (2)

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Covenants of this nature will be construed strictly and will not be extended on the ground of presumed intention so as to make the defendant liable: *Kemp v. Bird* (3) ; *Brigg v. Thornton*. (4) The defendant is an innocent person who was not in possession of the property at the time when the breach was committed, and we submit that the covenant ought not to be extended so as to make him liable. An order on the defendant to pull the building down would be contrary to the decision of the Court of Appeal in *Gaskin v. Balls* (5), and even if there is a continuing breach of a negative covenant, there is no reported decision which would be an authority for throwing upon the defendant the liability to incur expense in removing the building.

*P. O. Lawrence, K.C.* in reply. The first point urged on behalf of the defendant is that this covenant does not operate to affect the assigns of the covenantor so as to make him liable for what they do, and *Kemp v. Bird* (3) was cited to shew that the covenant does not deal with anything more than the acts of the covenantor. But I submit that the true construction of this covenant is that the word "he" means "himself his executors administrators and assigns," and that the covenant is clearly drawn so as to bind the assigns as well as the person covenanting. If it be such a covenant as will run with the land, then it will bind the defendant. In either case the defendant is liable in damages for the breach, and for that reason this case is distinguishable from *Hall v. Ewin*. (6)

Moreover in this case there is the lessees' covenant to perform and observe the restrictive stipulations and indemnify the defendant against breach of them. There was no such covenant

(1) [1900] 2 Ch. 156.

(2) (1875) L. R. 10 C. P. 342.

(3) 5 Ch. D. 974.

(4) [1904] 1 Ch. 386.

(5) 13 Ch. D. 324.

(6) 37 Ch. D. 74.

EVE J. in *Kemp v. Bird* (1), and Cotton L.J. deals with that point in his judgment.

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The second point urged against the plaintiff is that there is no breach by the defendant and that the covenant ought not to be extended on the ground of presumed intention as pointed out by Romer L.J. in *Brigg v. Thornton* (2), but I ask the Court to take the fair meaning of this covenant, and that is that the grantee is not to erect any buildings without first having obtained the approval of the grantor, his heirs and assigns, to the plans. That construction is borne out by the conditions that the submission of the plans is to be before the commencement of the erection of any building and the approval is not to be arbitrarily withheld. It is in substance a negative and restrictive covenant rendering the covenantor liable for a breach by his assign, and not merely making the assign liable for his own breach. The defendant is in possession and can remedy the breach, and, I submit, without necessarily incurring expense.

If I am right upon the construction of the covenant, then I submit that this case does not come within the decision of Stirling J. in *Jacob v. Down* (3), and that there is a continuing breach, and, further, that it is not material whether the defendant has regained possession voluntarily or otherwise. He has stood by and actively participated in the breach and cannot now say that he is not liable.

*Cur. adv. vult.*

Feb. 24. EVE J. The plaintiff is the owner of a mansion-house and grounds known as Lenton Hall, near Nottingham. The defendant is the owner of a piece of adjoining land whereon is standing a derelict structure, the roofed-in carcase of an uncompleted dwelling-house. The structure is situate about 420 feet from the Hall, is visible from all the principal rooms, and in part overlooks the garden and pleasure grounds; it is unpleasing in appearance, built of inferior and unsightly materials by speculative builders who, as one witness observed, were obviously short of money, and is rapidly deteriorating from neglect and exposure to the elements.

(1) 5 Ch. D. 974.

(2) [1904] 1 Ch. 386.

(3) [1900] 2 Ch. 156.

By this action the plaintiff seeks to compel the defendant to pull down and remove the structure, and he founds that claim upon the allegation that the erection of the structure and its continued existence on the site it occupies constitute breaches of covenant for which the defendant is liable. He further alleges that the defendant threatens and intends so to alter and adapt the structure as to involve further breaches of covenant, and he claims an injunction to restrain these threatened breaches, and, in addition, damages and costs.

The defendant denies the several breaches alleged; he denies that he ever threatened or intended to commit any breaches; and he further contends that if the structure was in fact erected in breach of covenant he is under no liability in respect thereof, and under no obligation to pull it down. Finally, he denies that its erection has caused the plaintiff any damage, and upon these issues the action has been tried. [His Lordship then stated the facts and material covenants above set out, and continued:—]

I have already indicated the issues involved in the action. To the first of them, whether the house is erected in breach of covenant, I think an affirmative answer must be given.

In the first place I am of opinion that there is a breach of the covenant as to the position of the outbuildings. The house is provided with one water-closet only; it is an outside building, built on and attached to the end of the house, with no access from the interior of the house; the door fronts towards the proposed new road, and would be in full view of anybody passing along the road and of any house built on the plaintiff's land on the opposite side of the road. I think that an outside closet not accessible from the inside of the house is an outbuilding, notwithstanding that it is not built wholly separate from the house, within the meaning of the covenant, and that its position at the front end of the house is a breach of the stipulation that all outbuildings are to be erected in the rear.

Further I think that the covenant by the purchaser that he will before the commencement of any building submit the plans thereof for the approval of the vendor involves a negative contract that no building shall be commenced until plans have

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been submitted to and approved by the vendor. As I have already stated, no plans were ever submitted and no approval obtained, and in this respect also the erection was a breach of covenant. The building, therefore, has been erected in breach of covenant, and I am satisfied on the evidence that its existence materially affects the value of the plaintiff's property.

But the question remains, Is the defendant liable to pull it down? In order to answer this question it is necessary to consider three points—(1.) the nature of the breach; (2.) the persons by whom and the circumstances in which the breach was committed; and (3.) the actual covenants into which the defendant has entered.

It has been argued on the part of the plaintiff that the breach is a continuing breach—that there is a new breach of covenant every day the house is left standing. I cannot adopt this view. In my opinion the covenant was broken once and for all when the house was erected contrary to it; it was a breach complete at once and not continuous: see per curiam in *Doe v. Woodbridge*. (1) The defendant therefore cannot be liable on the footing of a continuing breach.

Upon the second point, the facts and documents I have already stated shew that the breach was committed not by the defendant, but by his lessees, Taylor and Fletcher, and although it is true that he did not intervene to prevent the breach, I cannot hold upon the evidence that he did anything so calculated to encourage or promote the breach as to render him liable for the violation of the covenant: *Hall v. Ewin*. (2)

The question remains, Do the covenants into which the defendant has entered render him liable for breaches thereof committed by his assigns?

The form of covenant is a covenant by the purchaser for himself his executors administrators and assigns that he will or will not do the particular act. Is such a covenant—as the plaintiff argues it is—equivalent to a covenant by the purchaser for himself his executors administrators and assigns that he his executors administrators and assigns will or will not do the particular act? I do not think it is. I have not been able to

(1) 9 B. & C. 376.

(2) 37 Ch. D. 74.



find any authority upon the point, but in my view the words are used in the first part of the covenant to indicate the intention that the covenants shall run with the land, and not to impose on the covenantor liability for the acts of his assigns.

The result is that the breach is not a continuing one; it was not committed by the defendant, and neither by conduct nor by contract is he liable for it. I cannot, therefore, order him to pay damages or to remedy the breach. Nor upon the evidence can I hold there is any threat or intention on the part of the defendant to commit a breach, and in these circumstances I can only dismiss the action with costs.

I will only add this, that I think upon the strict construction of the covenant as to plans the obligation to deliver them for the approval of the covenantee lay on the defendant, notwithstanding the lease to Taylor and Fletcher, but in any action founded on a breach of this covenant the plaintiff would only be entitled to nominal damages, and not to any such order as is claimed in this action.

Solicitors: *Busk, Mellor & Norris, for Powell & Jarvis, Newtown; Gribble, Oddie, Sinclair, Rowlatt & Johnson, for Arthur Barlow, Nottingham.*

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[1909 C. 155.]

Feb. 23, 24.

*Trustees—Gift to Persons upon trust to sell without adding “and their heirs”  
—Inability of Executors of last surviving Trustee to execute Trust—Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 30.*

The person who is to execute a trust or exercise a power must be a person who is in some way pointed out by the creator of the trust or power as a proper person to execute or exercise it.

A., who died in 1883, devised his residuary estate to B., C., D., and E. (the words “and their heirs” being omitted) upon trust, after B.’s death, for sale as if they were absolute owners. The will gave the trustees powers to postpone the sales, and demise and manage during postponement, and enabled the original number of trustees to be reduced, but not below two, on any appointment of new trustees.

All the trustees, who were also executors of the will, proved it, and in 1908 D., the surviving trustee, died, having appointed executors by his will:—

*Held*, that D.’s executors could not make a good title to a freehold house forming part of the residuary estate of A.

*In re Ingleby and Boak and Norwich Union Insurance Co.*, (1883) 13 L. R. Ir. 326, followed.

*In re Pixton and Tong’s Contract*, [1897] W. N. 178; 46 W. R. 187, distinguished.

*Osborne to Rowlett*, (1880) 13 Ch. D. 774, doubted.

*Seemle*, that if in the will of A. the devise had been to the four trustees and their heirs, the heir of the surviving trustee could, apart from s. 30 of the Conveyancing and Law of Property Act, 1881, have executed the trust for sale, and by virtue of that section his legal personal representatives would have been substituted for his heir.

THOMAS CRUNDEN by his will dated January 28, 1873, appointed his wife, Elizabeth Crunden, his brother George Robert Crunden, and his sons Thomas Brown Crunden and Frederick Crunden executors thereof. After a bequest of household furniture and other personal property and a legacy of 500*l.* to the testator’s wife, and a devise of certain real estate and a business to the same two sons, the will proceeded as follows: “I devise and bequeath the residue of my estate to my said wife and brother and my said sons Thomas Brown Crunden and

Frederick Crunden, upon trust during the lifetime of my said wife with her written consent and afterwards at the discretion of my trustees, to sell, convert, and get in my said residuary estate in such manner as my trustees may think fit, and with as full powers as if they were absolute owners, and after payment of my debts, funeral and testamentary expenses and pecuniary legacies to stand possessed of the proceeds of sale and conversion" upon the trusts thereafter declared.

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The will gave the trustees powers to postpone the sale of any part of the residuary estate for such period as they should deem expedient, and to let on lease and manage any unsold part of it, and also declared that on any appointment of new trustees the original number might be reduced, but not below two, and that the expression "my trustees" should be construed to mean "the trustees or trustee for the time being of my will."

The testator died in May, 1883, and his will was proved by all the executors in June, 1883.

The brother, one of the sons, and the wife of the testator died in 1890, 1894, and 1899 respectively. Frederick Crunden, the last surviving trustee, died in 1908, having by his will appointed executors.

These executors contracted to sell a freehold house forming part of Thomas Crunden's residuary estate.

The purchaser by her requisitions required that new trustees of Thomas Crunden's will should be appointed before the property was conveyed. The vendors replied that they were the trustees of the will and that no appointment of new trustees was necessary, and on the requisition being insisted on they took out a summons under the Vendor and Purchaser Act, 1874, for a declaration that, as legal personal representatives of the last surviving trustee, they could exercise the trust for sale.

*A. Beddall*, for the vendors. By s. 30, sub-s. 1, of the Conveyancing and Law of Property Act, 1881, where an estate of inheritance is vested on any trust in any person solely, who dies after December 31, 1881, the same on his death devolves to and becomes vested in his personal representatives in like manner as if it were a chattel real vesting in him, and they have the like

PARKER J. powers to dispose of and otherwise deal with the same as if it were a chattel real vesting in them, and for the purposes of the section the personal representatives of the deceased are to be deemed in law his heirs and assigns within the meaning of all trusts and powers. The questions are (1.) whether the executors of the last surviving trustee can exercise the trust for sale given by the will, although the trust is not expressly stated to be exercisable by them "or their heirs," and (2.) whether, if those executors are not trustees of the original will, they can appoint themselves trustees thereof.

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It is admitted that the original trustees took the estate in fee simple, and that, if there had been a limitation to them and their heirs upon trust for sale, the heirs of the survivor could before 1882, and the executors of the survivor could after 1882, have given a good title on a sale. The difficulty arises through the decision in *In re Ingleby and Boak and Norwich Union Insurance Co.* (1) There is no case prior to 1881 which says that if the estate is given by will upon trust for sale, without the word "heirs" being used, the heirs of the surviving trustee cannot execute the trust. The older cases were examined by Jessel M.R. in *Osborne to Rowlett* (2), in which case he held that where real estate is devised to trustees and "their heirs," omitting the words "and assigns," the trust is to be considered as annexed, not to the person, but to the fee simple estate taken by the trustees, and that the trust can be executed by the devisees of trust estates of the last surviving trustee. That means that the trust can be executed because the heirs take the estate and the intention is that the trust shall be annexed to the estate, not that the heirs can execute the trust because the testator has shewn personal confidence in them. In *Cooke v. Crawford* (3) there was a gift to three named trustees upon trust that they or the survivors or survivor of them or the heirs of such survivor should sell, and Shadwell V.-C. held that the devisees in trust of the surviving trustee could not sell. Jessel M.R. in *Osborne to Rowlett* (2) referred to that and other cases, and dissented from the decision of Shadwell V.-C. and treated it as having been overruled.

(1) 13 L. R. Ir. 326.

(2) 13 Ch. D. 774.

(3) (1842) 13 Sim. 91.



[PARKER J. None of the cases referred to by Jessel M.R. were the same as *Cooke v. Crawford*. (1) ]

In *In re Morton and Hallett* (2) the testator devised freeholds and copyholds to trustees and their heirs upon trust that they or the trustees or trustee for the time being of his will should sell, and empowered them to give receipts and gave a power to appoint new trustees, and it was held by Jessel M.R. and the Court of Appeal that the customary heir of the last surviving trustee could sell the copyholds. In that case *Osborne to Rowlett* (3) was not overruled, but James and Baggallay L.JJ. refrained from saying that *Cooke v. Crawford* (1) was overruled. The word "heirs" is a word of limitation only and need not be used in a will in order to pass the fee simple. It is contended, therefore, that as it is mere surplusage, the effect is the same where the word is omitted.

In *In re Ingleby and Boak and Norwich Union Insurance Co.* (4), decided after the passing of the Conveyancing and Law of Property Act, 1881, it was held that where the heirs were not named in the devise the executors of the last surviving trustee could not execute a trust for sale. But that case was not followed by Byrne J., who held that, where real estate was given unto and to the use of trustees, their heirs and assigns, by a will which gave to the trustees thereof for the time being power to sell the real estate, the executors of the last surviving trustee could make a good title: *In re Pixton and Tong's Contract*. (5)

[PARKER J. In the note of that case in the *Weekly Notes* (6) it is stated that Byrne J. distinguished the Irish case on the ground that the word "heirs" was not in the devise in that case.]

That is not stated in the report in the *Weekly Reporter*. If the executors of the last surviving trustee are not now the trustees of the will of the original testator, they can appoint themselves trustees of that will and then execute the trust for sale. [He also referred to *In re Waidanis* (7) and *Lane v. Debenham*. (8)]

(1) 13 Sim. 91.

(2) (1880) 15 Ch. D. 143.

(3) 13 Ch. D. 774.

(4) 13 L. R. Ir. 326.

(5) 46 W. R. 187.

(6) [1897] W. N. 178.

(7) [1908] 1 Ch. 123.

(8) (1853) 11 Hare, 188.

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PARKER J. *W. F. Webster*, for the purchaser. The Court can act on either of two rational principles, one of which is that the power or trust is annexed to the ownership of the land, and the other that the trustee for the time being is the person who is indicated by the testator to perform the trust or exercise the power. The balance of authority is in favour of the principle secondly stated; and where the devise is to A. and B. and their heirs upon trust to sell, the persons who are to execute the trust are indicated. It is not necessary in each case to shew that the testator has personal confidence in those who are nominated or indicated, the real question being whether he has nominated or indicated the persons who claim to be entitled to execute the trust. What is to be ascertained is whether the testator intended that persons claiming to be entitled to execute the trust should be so entitled: *Mortimer v. Ireland*. (1)

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The observations of Jessel M.R. in *In re Morton and Hallett* (2) shew that he was not too confident that his decision in *Osborne to Rowlett* (3) was correct, and, having regard to what the Lords Justices said in *In re Morton and Hallett* (2), *Cooke v. Crawford* (4) cannot be said to have been overruled. The mere fact of ownership of property subject to a trust for or power of sale does not ex necessitate enable the owner to give a good title: *In re Rumney and Smith*. (5) Sect. 30 of the Conveyancing and Law of Property Act, 1881, does not help the vendors. They are not trustees for sale and they cannot appoint themselves trustees for sale. [He also referred to the Trustee Act, 1893 (56 & 57 Vict. c. 53), ss. 22, 37, and the Law of Property Amendment Act, 1859 (22 & 23 Vict. c. 35), ss. 14, 15.]

*A. Beddall*, in reply, referred to *Robson v. Flight*. (6)

PARKER J. This is a vendor and purchaser summons, and the point in question is whether the legal personal representatives of the last surviving trustee of a will containing a trust for sale can execute such trust when the estate is not devised to the original trustees and their heirs, but to them simply, without words referring to their heirs.

(1) (1847) 11 Jur. 721.

(2) 15 Ch. D. 143.

(3) 13 Ch. D. 774.

(4) 13 Sim. 91.

(5) [1897] 2 Ch. 351.

(6) (1865) 4 D. J. & S. 608.

A great many authorities have been referred to, and, with the possible exception of *Osborne to Rowlett* (1), all of them seem to me to proceed on the footing that the person who is to execute a trust or power must be a person who is in some way pointed out by the creator of the trust or power as a proper person to execute it. I may for example refer to two passages in cases that have been cited, one of which is in *Cooke v. Crawford* (2) where Shadwell V.-C. uses these words: "There is no case in which a person not mentioned by the party creating the trust, has been held entitled to execute it." That also appears to have been the opinion of Stirling J., for in *In re Rumney and Smith* (3) he says: "I think that the view of the Court down to the present time has been that trusts for sale and powers of sale can only be executed by the person or persons authorized so to do by the instrument which creates them. I know of no case inconsistent with that view." In the same case Chitty L.J. says (4), although his dictum relates only to powers, "There must be some words of limitation which on a fair and proper construction of the whole instrument shew the intention that the power should be exercised by some other person than its original donee." The question there was whether a power of sale in a mortgage could be executed by an assign of the mortgage debt. I think that *Osborne to Rowlett* (1) departs from that view of the law. I am not quite sure, although it is not necessary to decide the matter in the present case, whether *Osborne to Rowlett* (1) can be regarded as a good decision. In that case Jessel M.R. seems to have thought it necessary to dissent from *Cooke v. Crawford* (5), thinking, as I gather, that his own decision and the decision in that case could not stand together. What he decided in *Osborne to Rowlett* (1) was that where real estate was devised to trustees and their heirs upon trust to sell and dispose of the same, the devisees of the last surviving trustee could sell, though assigns were not mentioned in the devise. Of course, the case would have been clear if the devise had been to the trustees, their heirs and assigns, on trust to sell; and the ratio decidendi, so

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(1) 13 Ch. D. 774.

(3) [1897] 2 Ch. 351, 356.

(2) 13 Sim. 96.

(4) *Ibid.* 360.

(5) 13 Sim. 91.

PARKER J. far as I can make out, was that Jessel M.R. gathered from the instrument an intention on the part of the creator of the settlement that the trust should be executed by the person having the legal estate for the time being, though the only words suggesting it were those of the limitation to the trustees and their heirs. Those words seem to me to mean that the land is devised to the trustees and their heirs on trust that they shall sell; in which case I take it that the heirs are the only persons, besides the trustees, pointed out as capable of executing the trust. *Osborne to Rowlett* (1) has been, I will not say doubted, but, so far as it is inconsistent with *Cooke v. Crawford* (2), considered open to criticism; for in the later case of *In re Morton and Hallett* (3) James and Baggallay L.JJ. both doubt whether the criticisms by Jessel M.R. of *Cooke v. Crawford* (2) in *Osborne to Rowlett* (1) are good and legitimate criticisms; and, as I have said, if *Cooke v. Crawford* (2) is good law, it is doubtful whether *Osborne to Rowlett* (1) can be so also. I propose, at any rate, in the present case to act on the principle to be derived from the other cases, which is that the real test whether the heir of the last survivor of several trustees can execute a trust or power of sale is whether he is pointed out in the instrument creating the trust as being, in the contemplation of the settlor, a person who is to execute it. In the present case there is a devise of residue to the testator's wife, brother, and sons, upon trust during the lifetime of his wife, with her written consent, and afterwards at the discretion of the trustees, to sell, convert, and get in the residuary estate in such manner as his trustees may think fit, and with as full powers as if they were absolute owners. Reading that in the way I have suggested, the trust is given to the four persons named as trustees, to be executed at their discretion and in such manner as they shall think fit. There is, further, a power given to the trustees to postpone the sale and to demise the property during the postponement. There is also a clause providing that on an appointment of new trustees the number may be reduced to two, and a provision that the expression "my trustees" is to mean the trustees or trustee for the time being of

(1) 13 Ch. D. 774.

(2) 13 Sim. 91.

(3) 15 Ch. D. 143.



the will. If the limitation in the will had been to the named trustees and their heirs on trust to sell, I think that the heirs might have been taken as persons who, in the contemplation of the settlor, were to execute the trust; but as they were not named there or elsewhere in the document as persons contemplated, I think that the trust is only exercisable by the persons named or trustees subsequently appointed under the instrument or the statutory power or by the Court, and that the heir of the last surviving trustee is not himself a trustee in the sense that he is capable of executing the trust created by the instrument.

So much for the question of construction; but I wish also to refer to one or two other cases as supporting my view of what is the principle of reported cases. The first is *In re Morton and Hallett*. (1) In that case there was a devise to trustees and their heirs upon trust that they the said trustees, or the trustees or trustee for the time being of the will, should sell the estates. Further, the trustees or trustee for the time being were empowered to give receipts. Jessel M.R. analyses the will and holds that on its true construction the heirs are pointed out as capable of executing the trust. That decision was affirmed on appeal, and James L.J. says (2): "I agree with the Master of the Rolls that if an estate is given to A. and B. and their heirs on trust to sell, the heir of the survivor of A. and B. is a trustee under the will, takes the estate on trust for sale, and can sell it"; and the other Lords Justices agreed. In *Mortimer v. Ireland* (3), which has also been referred to, the survivor of a number of trustees appointed an executor and bequeathed to him all property vested in the former as trustee, and it was held that the executor thus appointed was not thereby made trustee of the original testator in place of his own testator, because no intention to that effect could be gathered from the instrument creating the trust. We are therefore again referred back to the construction of the instrument in order to see whether the derivative trustee is a trustee who can execute the trust. In that case Lord Cottenham L.C. says: "The argument amounts to this, that the

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(1) 15 Ch. D. 143.

(2) 15 Ch. D. 149.

(3) 11 Jur. 721.

PARKER J. executor of a trustee is of right a trustee. Whether the property is real or personal estate is no matter, for suppose a man appoints a trustee of real and personal estate simpliciter, adding nothing more, this cannot make his representative a trustee. The case before the Master of the Rolls (1) was quite different, for there the Court proceeded on the intention manifested, that the trust should be performed by the assigns of the survivor. The property may vest in the representative, but that is quite another question from his being trustee. The testator may select the heir to succeed to the trust, but he only can do so. Here there are two persons appointed trustees; both die; thus there is no trustee, and it is for the Court to appoint new ones. The testator having given no indication of intention, the Court must refer it to the Master. The decree of the Vice-Chancellor is right in its form. The appeal must be dismissed." That decision again points out that, unless the person in question is indicated in the instrument as a person who is to succeed to the trust, he is not a trustee and cannot execute it. Though he may hold the property subject to the trust and be a trustee in that sense, he is not a trustee in the sense that he can actually execute the trusts.

The same principle is recognized in *In re Ingleby and Boak and Norwich Union Insurance Co.* (2) There a testatrix appointed A. and B. as executors and trustees of her will, and devised certain specified properties and all other estates or interests belonging to her in Ireland to and to the use of A. and B., upon trust for sale of such part or parts thereof as might in their judgment be necessary for the discharge of debts and legacies; and as to the remainder thereof upon trust that they, or the survivors or survivor of them, should receive the rents and pay them to A. for life, and after his death sell the same, and divide and pay the proceeds to or among her nieces. The question was whether the executors of the survivor of the trustees could sell the property by virtue of s. 30 of the Conveyancing and Law of Property Act, 1881, which in cases since the Act came into operation substitutes the executors of the survivor for the heirs where a trust or power is given to the heirs.

(1) *Titley v. Wolstenholme*, (1844) 7 Beav. 425.

(2) 13 L. R. Ir. 326.

It was held that where the heirs were not mentioned either as a word of limitation or otherwise (the effect of using the word being recognized as pointing out that the heirs were in the contemplation of the creator of the trust persons to execute it) the legal personal representatives who had only the powers of the heir transferred to them by the Act were in no better position than the heir would have been and could not execute the trust. That again was recognized as the real test by Byrne J. in *In re Pixton and Tong's Contract*. (1) The judgment in that case as reported in the *Weekly Reporter* does not really indicate the point which arises in the present case; but the report in the *Weekly Notes* does indicate that Byrne J. considered that the case before him was distinguishable from *In re Ingleby and Boak and Norwich Union Insurance Co.* (2), because the heir was mentioned in the case before him, but not in the Irish case, as a person who might in the contemplation of the settlor execute the trust. The same principle is again recognized in *In re Waidanis*. (3) That was a decision of Swinfen Eady J., the facts being that Elizabeth Waidanis by her will devised and bequeathed property to the person or persons who should at her death be the trustee or trustees of her father's will, and the question was whether the executors of the last surviving trustee of the father's will were trustees within the words of Elizabeth's will. It appears that the father's will had devised real estate to trustees therein named and their heirs and assigns on certain trusts; and I think it was because of the mention of heirs and assigns that Swinfen Eady J. held that the legal personal representatives, who were in effect the heirs, were pointed out as persons to execute the trust and were therefore entitled to execute the trust as being trustees within the meaning of the expression. I have now more or less gone through the cases illustrating the principle, and all of them are in my opinion consistent, except possibly *Osborne to Rowlett* (4), and therefore I must adopt the principle as the law governing questions of this sort, and decide that the legal personal representatives of the last surviving

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(1) [1897] W. N. 178; 46 W. R. 187.

(3) [1908] 1 Ch. 123.

(2) 13 L. R. Ir. 326.

(4) 13 Ch. D. 774.

PARKER J. trustee in the present case, not being persons, or having the powers of persons, pointed out by the creator of the trust as persons to execute it, cannot sell the property.

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I ought to add a word as to s. 30 of the Conveyancing and Law of Property Act, 1881. That section provides first that "where an estate or interest of inheritance, or limited to the heir as special occupant, in any tenements or hereditaments, corporeal or incorporeal, is vested on any trust, or by way of mortgage, in any person solely, the same shall, on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time, in like manner as if the same were a chattel real vesting in them or him; and accordingly all the like powers, for one only of several joint personal representatives, as well as for a single personal representative, and for all the personal representatives together, to dispose of and otherwise deal with the same, shall belong to the deceased's personal representatives or representative from time to time, with all the like incidents, but subject to all the like rights, equities, and obligations as if the same were a chattel real vesting in them or him." I think that the meaning of this first part of the section is simply that for the purposes of devolution an estate of inheritance is to be considered as a chattel real, and the legal personal representatives are to have the same powers as if it were a chattel real, and the estate is to be subject to the same equities. The section then proceeds as follows: "and for the purposes of this section, the personal representatives, for the time being, of the deceased, shall be deemed in law his heirs and assigns, within the meaning of all trusts and powers." Of course, if in the instrument in the present case the heir of the last surviving trustee had been named, he could have exercised the powers, and by virtue of the section the legal personal representatives would be substituted for the heir; but I do not think that either part of the section confers on the legal personal representatives powers additional to those which the heir would have had. It is said that if this had been a chattel real the legal personal representatives would have taken it, and been trustees for sale, and therefore that they are within the first part of the section, if not



the second; but in view of *Mortimer v. Ireland* (1) I think that, even if it had been a chattel real, the legal personal representatives would have been in the position in which they are as trustees in the case of real estate; for there is nothing in the will to shew that even the legal personal representatives of the last surviving trustee are as regards personal estate, if any, pointed out as persons to execute the trust. I can only, therefore, having regard to the reported decisions on the question, declare that the legal personal representatives of the last surviving trustee cannot make a title.

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Solicitors for the vendors: *Booth & Smee, for FitzHugh, Woolley, Baines & Woolley, Brighton.*

Solicitors for the purchaser: *Walmsley & Stansbury, for J. E. Dell & Loader, Brighton.*

F. E.

### *In re* RUDDINGTON LAND.

[1909 R. 017.]

PARKER J.  
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Feb. 20;  
March 6.

*Industrial and Provident Societies—Dissolution—Advertisement of Instrument while Assets vested in Society—Appointment of New Trustee—Vesting Order—Bona Vacantia—Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), ss. 58, 61—Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 25, sub-s. 1; s. 26; s. 35, sub-s. 1.*

The property of an incorporated industrial or provident society dissolved by instrument of dissolution under ss. 58 and 61 of the Industrial and Provident Societies Act, 1893, is subject to a trust for appropriation and division (after providing for the claims of creditors) in accordance either with the provisions of the instrument, or with the award of the chief registrar. Where dissolution took place before the society had handed over some of its property to the person nominated by the instrument of dissolution to realize its assets, the Court (the Crown not claiming the property as *bona vacantia*) appointed him a trustee in the place of the society, and made an order vesting the property in him on the trusts applicable thereto under the instrument.

THE Ruddington Carrying Society, Limited, was registered on November 22, 1878, under the Industrial and Provident Societies Act, 1876, for carrying on any kinds of labours, trades, and

(1) 11 Jur. 721.

PARKER J. handicrafts, and the businesses of coal agents, general carriers,  
1909 farming, and the buying and selling of land. The registered  
RUDDINGTON office of the society was at Ruddington, in the county of  
LAND, Nottingham.  
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By s. 11 of the Act of 1876 the society became on registration a body corporate.

By s. 3 of the Industrial and Provident Societies Act, 1893, every incorporated society then existing which had been registered or certified under any Act relating to industrial and provident societies was to be deemed to be a society registered under the Act of 1893.

By an instrument of dissolution made October 10, 1908, pursuant to the Industrial and Provident Societies Act, 1893 (1), signed by three-fourths of the members, and registered under that Act on October 28, 1908, it was agreed and declared that the liabilities and assets of the society, the number of members, shareholders, or bondholders thereof, and the nature of their interests respectively, and their claims in respect of dividends and interest, and the other creditors and debts of the society, were as therein stated; that the other creditors should be paid (along with certain amounts due to the treasurer and officials) as a first and prior payment out of the proceeds of the realization of the assets of the society and prior to the claims of members, and that the funds and property of the society should be appropriated and divided as follows: First, the real and personal estate and assets of the society were to be realized with all convenient speed by Alfred Wilson, of Ruddington, auctioneer and valuer, assisted by a committee of four persons specially appointed, and meanwhile the business of the society was to be carried on only so far as should be necessary to carry out existing contracts, to preserve the business as a going concern, and to effectuate an advantageous winding-up; secondly, the

(1) By s. 58 of the Act of 1893 (56 & 57 Vict. c. 39), "A registered society may be dissolved: (a) By an order to wind up the society, or a resolution for the winding up thereof, made as is directed in regard to companies by the Companies Acts, 1862

to 1890, the provisions whereof shall apply to any such order or resolution . . . ; or (b) By the consent of three-fourths of the members, testified by their signatures to an instrument of dissolution."

costs and expenses of and incident to the winding-up were to be first paid out of the proceeds realized by the conversion of the assets; thirdly, all rates and taxes and similar payments, and all ordinary trade debts, and the amounts due for salaries to officials, were to be paid; fourthly, the amounts due for interest on loans to bondholders, and then the principal of such loans, were to be paid; and, fifthly, the residue (if any) of the proceeds of conversion was to be divided amongst the shareholders proportionately to their respective holdings of shares, and without any preference or priority. (1)

Pursuant to s. 61 (c) of the Act of 1893 a statutory declaration that the provisions of the Act had been complied with was made by three of the members and the secretary, and was sent, with the instrument of dissolution, to the Registrar of Friendly Societies. In pursuance of s. 61 (e) the Registrar caused a notice of the dissolution of the society to be advertised in the *London Gazette* of November 6, 1908, and in a local newspaper of November 7, 1908. The society was at the date of the instrument of dissolution the owner in fee simple of a piece of land at Ruddington, under a conveyance made in 1880, subject to a

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(1) Sect. 61 of the Act of 1893 is, so far as material, as follows:—  
“Where a society is terminated by an instrument of dissolution: (a) The instrument of dissolution shall set forth the liabilities and assets of the society in detail, the number of members and the nature of their interests in the society respectively, the claims of creditors (if any) and the provisions to be made for their payment, and the intended appropriation or division of the funds and property of the society, unless the same be stated in the instrument of dissolution to be left to the award of the chief registrar . . . ; (c) A statutory declaration shall be made by three members and the secretary of the society that the provisions of this Act have been complied with, and shall be sent to the registrar

with the instrument of dissolution . . . ; (e) The registrar shall cause a notice of the dissolution to be advertised at the expense of the society in the *Gazette* and in some newspaper circulating in or about the locality in which the registered office of the society is situated; and unless, within three months from the date of the *Gazette* in which such advertisement appears, a member or other person interested in or having any claim on the funds of the society commences proceedings to set aside the dissolution of the society in the county court of the district where the registered office of the society is situate, and such dissolution is set aside accordingly, the society shall be legally dissolved from the date of such advertisement . . . .”

PARKER J. mortgage of 1885 to the Nottingham Permanent Benefit Building  
 1909 Society and to further charges made in 1893 and 1905. It was  
 RUDDINGTON also the owner in fee simple of an adjoining piece of land under  
 LAND, a conveyance made in 1884. In accordance with the instrument  
*In re.* of dissolution Alfred Wilson, by direction of the committee  
 of four, offered for sale by public auction on November 23, 1908,  
 all the hereditaments comprised in the conveyances of 1880 and  
 1884, and they were purchased by the highest bidder. There  
 was due to the building society on its securities a sum of about  
 400*l.*, and the building society was willing to join in the convey-  
 ance to the purchaser. The legal estate of the unmortgaged land  
 comprised in the conveyance of 1884 being, however, at the date  
 of the dissolution vested in the industrial society, and there  
 being also various outstanding debts due to the society and not  
 assigned to Wilson, he, the committee of four, and the purchaser  
 presented a petition, intituled in the matter of the trusts affect-  
 ing the pieces of land and certain choses in action formerly  
 belonging to the society, and in the matter of the Trustee Act,  
 1893, asking for a declaration that the society was at and  
 immediately before the date of its dissolution possessed of the  
 pieces of land, subject to the mortgages, and of the choses in  
 action then belonging to the society, as trustee for Alfred  
 Wilson or any purchaser of the land from him; that pursuant  
 to s. 25 of the Trustee Act, 1893, Alfred Wilson might be  
 appointed a trustee of the pieces of land, subject to the mortgages,  
 and of the choses in action in the place of the society, and that,  
 pursuant to s. 26 of the same Act, the pieces of land might be  
 ordered to vest in him for all the estate or interest vested in the  
 society immediately before its dissolution on the trusts on which  
 the same were held by the society; or, alternatively, that they  
 might be ordered so to vest in the purchaser; and that the right  
 to sue for and recover the choses in action might, pursuant to  
 s. 35 of the same Act, be vested in Alfred Wilson. (1) On the

(1) Sects. 25, 26, 35, and 50 of the Trustee Act, 1893 (56 & 57 Vict. c. 53), are, so far as material, as follows:—

“25. (1.) The High Court may, whenever it is expedient to appoint

a new trustee or new trustees, and it is found inexpedient, difficult, or impracticable so to do without the assistance of the Court, make an order for the appointment of a new trustee or new trustees either in



petition coming on to be heard Parker J. ordered it to be served on the Attorney-General, in case the Crown should desire to claim the property as bona vacantia.

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*Percy F. Wheeler*, for the petitioners. The difficulty has arisen because the society was dissolved by advertising the instrument of dissolution before the debts had been assigned to Wilson and while the legal estate in some of the land remained in the society. The society was a trustee of the property at that time, and its surplus assets are divisible among the members: *In re Printers and Transferrers Amalgamated Trades Protection Society*. (1) We ask the Court to appoint a new trustee and also to make a vesting order, as Warrington J. did in *In re No. 9 Bomore Road*. (2) In *In re Taylor's Agreement Trusts* (3) Buckley J. declined to hold that a dissolved company was a trustee who "cannot be found"; but in similar cases Farwell J. made vesting orders: *In re General Accident Assurance Corporation* (4); *In re Richard Mills & Co. (Brierly Hill), Ltd.* (5) [He also referred to *Hastings Corporation v. Letton*. (6)]

substitution for or in addition to any existing trustee or trustees, or although there is no existing trustee. . . ."

"26. In any of the following cases, namely:—(i.) Where the High Court appoints or has appointed a new trustee; and (ii.) Where a trustee entitled to or possessed of any land . . . cannot be found . . . the High Court may make an order (in this Act called a vesting order) vesting the land in any such person in any such manner and for any such estate as the Court may direct . . . Provided that—(a) where the order is consequential on the appointment of a new trustee the land shall be vested for such estate as the Court may direct in the persons who on the appointment are the trustees. . . ."

"35. (1.) In any of the following cases, namely:—(i.) Where the High Court appoints or has appointed a

new trustee; and (ii.) where a trustee entitled alone . . . to a chose in action . . . cannot be found . . . the High Court may make an order vesting the right . . . to sue for or recover a chose in action, in any such person as the Court may appoint: Provided that—(a) Where the order is consequential on the appointment by the Court of a new trustee, the right shall be vested in the persons who, on the appointment, are the trustees. . . ."

"50. In this Act, unless the context otherwise requires,— . . . the expressions 'trust' and 'trustee' include implied and constructive trusts. . . ."

(1) [1899] 2 Ch. 184.

(2) [1906] 1 Ch. 359.

(3) [1904] 2 Ch. 737.

(4) [1904] 1 Ch. 147.

(5) [1905] W. N. 36.

(6) [1908] 1 K. B. 378.

PARKER J. *Sargent*, for the Attorney-General. The Crown does not claim this property as bona vacantia.

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RUDDINGTON [PARKER J. What is the difference between this case and that of a corporation dissolved under the Companies Acts, as to which it was held in *In re Higginson & Dean* (1) that property held on trust for it passed to the Crown?]  
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The corporation in such a case is not dissolved until the winding-up is complete. This society was dissolved before the winding-up was complete.

PARKER J. This is a petition under the Trustee Act, 1893, to obtain an order appointing a trustee, and a consequent vesting order, in respect of property, both real and personal, of a society registered under the Industrial and Provident Societies Act, 1893, which has been dissolved. It appears that societies registered under the Act can be dissolved either (a) under the Companies Acts, or (b) by an instrument of dissolution with the consent of three-fourths of the members. If the former mode of dissolution be adopted, no difficulty in most cases need arise; for the liquidator will see that the society is properly kept alive till all its assets have been distributed. But if the second course be taken, s. 61 of the Act of 1893 applies, and the instrument may provide for the appropriation and division of the funds belonging to the society, though it is not necessary that it should do so, since the section also says that the same may be stated in the instrument of dissolution to be left to the award of the Chief Registrar. Therefore, under s. 61, on the dissolution of a society, which occurs as soon as the Chief Registrar advertises the instrument of dissolution, the funds have to be distributed under the provisions of the Act, either as specified in the instrument of dissolution or according to the award of the Chief Registrar. In the present case the instrument of dissolution was executed and advertised, and the society became dissolved as from the date of the advertisement, before any of the property had been transferred to the agents or trustees under the scheme of dissolution, who were to see to its realization and distribution. They, therefore, are unable to sue in respect of the choses in

(1) [1899] 1 Q. B. 325.

action or get in the outstanding legal estate in the realty, and hence this application to the Court for relief. PARKER J.

I think that on the true construction of s. 61 the property of a society dissolved under an instrument of dissolution is subject to a trust for appropriation and division (after providing for the claims of creditors) in accordance either with the provisions of the instrument or with the award of the Chief Registrar, and that on the execution of the instrument the society becomes bound to hand over its property to the agents appointed or allow it to be disposed of as the Chief Registrar directs. After the execution of the instrument of dissolution the society becomes a trustee within the definition clause of the Trustee Act, 1893, which includes constructive trusts and trustees. The society is a trustee within that meaning of the word, and therefore a new trustee can be appointed. This being so, there is no difficulty as regards making a vesting order. Where no trustee can be appointed the jurisdiction arises only under sub-s. 2 (c) of s. 26 of the Trustee Act, 1893, and it is difficult to say of a trustee that he cannot be found when the trustee is known not to exist and is therefore, of course, impossible to find. But if the Court can appoint a new trustee under s. 25 a vesting order can be made; and in the present case, the Crown not claiming the property as bona vacantia, I can appoint Wilson a trustee in place of the society and make an order vesting the real estate and choses in action in him on the trusts applicable thereto under the instrument of dissolution.

Solicitors for petitioners: *Kinch & Richardson, for Eking, Wyles & Morris, Nottingham.*

Solicitor for Attorney-General: *Solicitor to the Treasury.*

F. E.

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DAVIES *v.* GAS LIGHT AND COKE COMPANY.

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[1908 D. 1656.]

March 22.

*Company—Shareholders' Address Book—Right of Shareholder to Copy—Action to enforce Right—Mandatory Order—Motives—Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 10.*

The right given to a shareholder by s. 10 of the Companies Clauses Consolidation Act, 1845, to have a copy of the shareholders' address book is a private right conferred on him as a member of the company and not as a member of the public. The appropriate remedy, therefore, for enforcing this right is either an injunction to restrain the company from refusing to supply or a mandatory injunction directing the company to supply him with the copy required. In granting this relief there is no jurisdiction to inquire into the motives of the applicant.

There is no distinction in principle between granting an injunction to restrain a company from interfering with a right and granting an affirmative order compelling a company to grant the right.

Decision of Warrington J., ante, p. 248, affirmed.

APPEAL from a decision of Warrington J. (1)

The facts are set out in greater detail in the report of the case in the Court below, but the following statement is sufficient for the purposes of this report.

The plaintiff, who was the holder of 100*l.* stock in the defendant company, in pursuance of the right given him by s. 10 of the Companies Clauses Consolidation Act, 1845, applied to the company for a copy of the shareholders' address book and offered to pay the expenses of making it. The company, in the belief that the applicant intended to use the copy for a purpose which it was alleged was not contemplated by the Act, declined to supply him with one. The applicant accordingly issued the writ in this action, claiming a mandamus commanding the company to supply him with a copy of the names and addresses of the shareholders.

Warrington J. made the order as claimed.

The defendant company appealed.

Rowden, K.C., and R. J. Neville, for the appellants. The Court has a discretion with regard to the particular relief claimed

(1) Ante, p. 248.



by this action. The information now demanded is only wanted for the purpose of circularizing the shareholders. The appropriate remedy under the circumstances of this case is a prerogative writ of mandamus. There are cases in which under similar words to those in s. 10 such a writ has been applied for; *Reg. v. Bank of England* (1) is an instance.

[FLETCHER MOULTON L.J. A prerogative writ is only used when there is no other remedy.]

The fact that a prerogative writ has been granted in cases of this kind shews that there is no private right of action.

The action of mandamus, which was first given by s. 68 of the Common Law Procedure Act, 1854, is only for the enforcement of a right which could have been enforced in an action before that Act, and in the case of a prerogative writ the Court has a discretion, and relief will only be granted on good cause being shewn. Even supposing a statutory action for mandamus is a new right, the same principles apply, and the Court will exercise its discretion as to granting relief. The only authorities that seem to be against this contention are *Holland v. Dickson* (2) and *Mutter v. Eastern and Midlands Ry. Co.* (3), and both were cases of injunction and not mandamus. The present action is really equivalent to an application for a prerogative writ. The plaintiff's right is created by statute, and the proper remedy before 1873 would have been by prerogative writ: *Reg. v. London and St. Katharine's Docks Co.* (4); *Rex v. Wilts and Berks Canal Navigation* (5); *Bush v. Beavan* (6); *Reg. v. Bank of England*. (1) The question of mandamus was fully considered in *Reg. v. Vestry of St. George, Southwark*. (7)

The action for mandamus was introduced by the Common Law Procedure Act, 1854. Order LIII. merely enables the Court to grant a positive injunction instead of a negative one, and there is nothing to shew that the distinctions introduced by the Common Law Procedure Act were not intended to be kept up. The Court did not intend in *Mutter v. Eastern and Midlands Ry. Co.* (3) to

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(1) [1891] 1 Q. B. 785.

(2) (1888) 37 Ch. D. 669.

(3) (1888) 38 Ch. D. 92.

(4) (1874) 31 L. T. 588.

(5) (1835) 3 Ad. & E. 477.

(6) (1862) 32 L. J. (Ex.) 54.

(7) (1892) 67 L. T. 412.

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lay down any general rule that it would never inquire into the circumstances of the case or the motives of the applicant.

*H. Terrell, K.C.*, and *Lavington*, for the respondent, were not called upon.

COZENS-HARDY M.R. This is an appeal from the decision of Warrington J., and it raises a point on which, apart from authority, I do not think I should have found any difficulty, but which in my view is absolutely concluded by authority.

More than twenty years ago Chitty J., in *Holland v. Dickson* (1), a case under a corresponding section relating to debenture stock, made an order, notwithstanding that the point was clearly taken before him that where, as is here alleged, a company or a public body is failing to perform a duty, the remedy is by mandamus and not by action for injunction. Chitty J. said (2): "This, however, is not a case in which the writ of prerogative mandamus would apply, but simply the case of a private owner of stock with a statutory right to see the books, and of an interference by the defendants with that statutory right. It seems to me to follow that when the statutory right of an individual is interfered with an injunction would have been granted by the old Court of Chancery, and at any rate ought now to be granted by the High Court." I accept this as a perfectly true and accurate statement of the law. In the same year, and very shortly afterwards, the point came before the Court of Appeal in *Mutter v. Eastern and Midlands Ry. Co.* (3) There again the point was raised that Mutter, the plaintiff, was really interested in an adverse company, the Great Eastern Company; that it was not an application made in good faith; and that there were good grounds, if it had been an application for a prerogative writ of mandamus, for refusing it. But both Chitty J. and the Court of Appeal declined to take that view. Lindley L.J., who gave the judgment of the Court, points out quite clearly (4) that the fact "that he has taken both the shares and the debenture stock at the instance of the Great Eastern Railway Company is made out by the cross-examination, but at the same time he is

<sup>\*</sup> (1) 37 Ch. D. 669.

(2) Ibid. 672.

(3) 38 Ch. D. 92.

(4) Ibid. 104.

unquestionably in point of law both a shareholder and a debenture stockholder; he therefore has the rights, whatever they may be, of a shareholder and a debenture stockholder, and whether he is trustee for other people we cannot inquire." What are those rights? The rights are given by s. 10 of the Companies Clauses Act. The company is to provide a book called the shareholders' address book; and every shareholder may, at all convenient times, peruse such book gratis, and may require a copy thereof, or any part thereof, on payment of a certain fee of 6*d.* for 100 words. His right seems to me to be perfectly clear. That right does not depend upon the motives he may have for exercising the right; he is a shareholder who desires to exercise it. It seems to me quite clear that the old jurisdiction of the Court of Chancery is still in force, and that that which in old days would have been called a mandatory injunction, taking a negative form, ought now to take the form which Warrington J. has given it by his order, namely, a positive order to do that which they are obliged to do by statute.

Then it is said that the writ is indorsed for a mandamus, and we are asked to say that this can only be supported if it was an action for a mandamus under the Common Law Procedure Act. I entirely decline to read it in that way. I think, with the facts before him, the learned judge was perfectly entitled—nay, bound—to give the relief which he did give, which was a relief well established in the old Court of Chancery, and consistent, in my view, with the plain language of s. 10. But I adopt, as really the keynote of his judgment, the passage in which he says (1): "In the present case I am of opinion, on the two authorities of *Holland v. Dickson* (2) and *Mutter v. Eastern and Midlands Ry. Co.* (3), that the action will lie. I can find no distinction in principle between granting an injunction to restrain a company from interfering with the right and granting an affirmative order compelling a company to grant the right."

In my opinion this appeal must be dismissed with costs.

(1) Ante, p. 259.

(2) 37 Ch. D. 669.

(3) 38 Ch. D. 92.

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FLETCHER MOULTON L.J. This is an action in the Chancery Division, in which the plaintiff sues for a mandatory injunction, not inaptly or incorrectly called a mandamus, to compel the company to grant to him certain private rights to which he is clearly and confessedly entitled by the language of s. 10 of the Companies Clauses Act of 1845. Not a shadow of answer or defence is suggested, but the Court is asked to refuse to exercise its powers to secure for the plaintiff his legal right. I can see no possible reason for not giving him the relief he asks; and even if I had any doubt about it, as the Master of the Rolls says, it is decided, and we are bound by authority on the point. But I must confess I do not feel any need to have recourse to that authority as the basis of my judgment. The arguments of counsel for the appellants have been based on a confusion between the proceedings in this case and proceedings which can only be taken on the common law side, namely, proceedings for the purpose of the extraordinary remedy of the prerogative writ of mandamus. In my opinion that has nothing whatever to do with the case before us, in which the plaintiff sues for a mandatory injunction such as the Court of Chancery was accustomed to grant long before the Judicature Act, and the jurisdiction to grant such an injunction is now common to both branches of the Supreme Court.

I am of opinion that this appeal is wholly unsustainable and should be dismissed.

FARWELL L.J. I agree and have nothing to add.

Solicitors: *Monier-Williams, Robinson & Milroy; Jordan & Lavington.*

W. C. D.



## WILLIAMS v. THOMAS.

[1907 W. 2357.]

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March 3, 4,  
15.

*Limitations, Statutes of—Recovery of Land—Action for Assignment of Dower—Time for ascertaining Value—Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 2—Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 1.*

The Real Property Limitation Act, 1833, as amended by the Real Property Limitation Act, 1874, does not apply to an action for assignment of dower.

*Marshall v. Smith*, (1865) 5 Giff. 37, overruled upon this point.

A dowress has two separate and independent rights, namely, a right to one third of the rents and profits from the death of the husband, and a right to have dower assigned to her; and if she claims and enjoys her right to the receipt of the rents and profits she will not be prejudiced by reason of not having, during that period, claimed her right to an assignment.

But *semble*, if for more than twelve years she does not claim any of her rights, the Court ought to refuse her relief on the ground of laches.

Dower ought to be assigned according to the value at the time of the assignment, and not according to the value at the time of the husband's death.

APPEAL from a decision of Eve J.

On August 24, 1885, Lewis Davies Rees died intestate and without issue, leaving him surviving the plaintiff, his widow, and two nieces, Mary Llewellyn, the wife of James Davies Llewellyn, and Ann Thomas, the wife of Alfred Charles Thomas (then Ann Williams, spinster), who were his coheiresses-at-law. The intestate died seised in fee simple of certain real property at Hengoed, Glamorganshire.

On February 7, 1889, the plaintiff married her present husband, Daniel Williams.

By an indenture of lease dated September 28, 1893, made between Mary Llewellyn of the first part, Ann Thomas of the second part, the plaintiff Ann Williams of the third part (the said Mary Llewellyn, Ann Thomas, and Ann Williams being thereafter referred to as "the said lessors"), certain mortgagees of Ann Thomas of the fourth part, and Daniel Williams of the

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fifth part, after reciting that “the lessors” were seised in fee simple in possession of the lands thereafter expressed to be demised “subject to the dower therein of the said Ann Williams” and subject also as to the moiety of the said Ann Thomas to a mortgage thereof in fee simple, a farm known as Hengoed farm, being part of the real estate of which the intestate died seised, was demised by “the lessors and mortgagees” according to their respective interests to Daniel Williams for a term of twenty-one years at the yearly rent of 42*l.* 10*s.*, payable as to one moiety to Mary Llewellyn and as to the other moiety to the mortgagees of Ann Thomas; and the lease contained a covenant by the lessee with “the said Mary Llewellyn and the said mortgagees” for payment of the rent, and a covenant by the said lessors and the said mortgagees for quiet enjoyment. The lease also contained a provision enabling “the said lessors or mortgagees” to resume possession for building purposes upon certain terms.

By an indenture of lease dated October 21, 1893, made between the same parties and framed in similar terms to the lease of September 28, in consideration of the sum of 170*l.* paid by the lessee to the coheiresses, certain other portions of the intestate’s real estate were demised to Daniel Williams for a term of 999 years at the yearly rent of 1*l.* 13*s.* 8*d.*, payable as to one moiety to Mary Llewellyn and as to the other moiety to the mortgagees of Ann Thomas.

From the time of the death of the plaintiff’s first husband until the granting of these leases the plaintiff was herself tenant of the lands in question, and she always deducted one third of the rent in respect of her dower. During the currency of these leases her second husband deducted one third of the rents in respect of the plaintiff’s dower, except on one occasion when, in consequence of the repeated remonstrances of Mr. A. C. Thomas, who collected the rents on behalf of the coheiresses, he paid the rents in full to Mr. Thomas, who then paid one third to the plaintiff. The plaintiff, however, always sent a receipt to Mr. Thomas for the amount deducted in respect of her dower.

By an indenture of sale dated December 2, 1893, to which the plaintiff was a party, after reciting that the plaintiff was entitled to dower in the Hengoed lands and that Mary Llewellyn and

Ann Thomas as coheiresses were entitled thereto in fee simple in possession subject to the dower of the plaintiff therein, in consideration of the sum of 50*l.* paid to the coheiresses, a portion of the Hengoed lands known as Greenfield Cottage was conveyed by the coheiresses and the mortgagees of Ann Thomas to John Jones released from all dower of the plaintiff in the said premises.

This cottage had previously been let to Mr. Jones at thirty shillings a year, and the plaintiff had received one third of the rent (ten shillings) in respect of her dower, and she declined to join in the conveyance until she had received an assurance from Mr. Thomas that the payment of the ten shillings should be continued to her.

Until the year 1905 the plaintiff always received in respect of her dower one third part of the rents and profits of the real estate of the intestate, but in that year, the land having become available for building purposes and having increased in value, the coheiresses disputed the plaintiff's right to anything more than one third of the rental actually produced at the time of the intestate's death; and from that time no portion of the rents and profits was received by the plaintiff.

On August 3, 1907, the plaintiff commenced an action against Ann Thomas and the trustees and executors of the will of Mary Llewellyn, who died in 1905, and the mortgagees of their respective shares for an assignment of her dower in the real estate of her late husband and for an account of the rents and profits of the said real estate since 1905 and payment of one third thereof to the plaintiff.

The defendants by their defence set up an arrangement alleged to have been made between the plaintiff and the coheiresses that the plaintiff should accept a sum equivalent to one third of the value of the rents and profits at the time of the intestate's death in lieu of dower. They further pleaded that the plaintiff's right to bring an action for assignment of dower was barred by the Real Property Limitation Act, 1874, and alternatively they pleaded that her right to an assignment was confined to an assignment of so much land only as would suffice at the present date to produce an annual rental equivalent to one third of the annual value as the same was at the date of the death of her late husband.

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The correspondence afforded some evidence of an acknowledgment in writing by Mr. A. C. Thomas of the plaintiff's right to dower, but there was no evidence of any acknowledgment by the coheiresses themselves within the statutory period.

Eve J. came to the conclusion upon the evidence that the plaintiff was in possession or part possession of the property within the statutory period. He also thought that the date at which the value of the lands subject to dower was to be ascertained was not the date of the death, but the date of the assignment. In the opinion of the learned judge there was really no defence to the action, and the plaintiff was entitled to the relief she claimed.

The defendants appealed.

*M. Lush, K.C.*, and *P. B. Abraham*, for the appellants. The right of the widow to bring this action is barred by s. 2 of the Real Property Limitation Act, 1833, and s. 1 of the Real Property Limitation Act, 1874. The later Act merely shortens the time to twelve instead of twenty years. The question depends on the construction of the Act of 1833. Sect. 1 of that Act defines land as extending to any share, estate, or interest in land, which must include dower, and the section provides that "the person through whom another person is said to claim shall mean any person by, through, or under, or by the act of whom, the person so claiming became entitled to the estate or interest claimed, as heir . . . . tenant in dower . . . . or otherwise." That shews that the Act applies to a claim for dower, and this point was decided in *Marshall v. Smith*. (1)

The report in the *Law Journal* gives the argument at greater length and shews that it was argued there, as here, that the Statute of Limitations did not apply because the dowress had no right of entry—Park on Dower, p. 334—but it was held that she was statute-barred. Eve J. has held that the widow was in possession because her second husband, who was lessee from the coheiresses-at-law of the first husband, kept back one third of the rents for her. But she was not in possession qua dowress, and she had no right to possession; her only right was to have had her dower set out and assigned to her by metes and bounds.

(1) 5 Giff. 37; 34 L. J. (Ch.) 189.



Sect. 3 of the Act of 1833, which deals with dispossession, does not apply to dower. The only section which could help the plaintiff is s. 14, as to acknowledgment, but that section requires acknowledgment by the principal, not his agent—*Ley v. Peter* (1); *Dublin Corporation v. Judge* (2)—and the only acknowledgment alleged here was by Mr. A. C. Thomas. Again the widow by joining in a lease of the property has abandoned her right to dower: *Dickin v. Hamer*. (3)

If the widow is entitled to have dower assigned at all, it must be according to the value of the land at her husband's death, not according to its present value: *Doe v. Gwinnell*. (4) There seems to have been great difference of opinion on the point—Park on Dower, p. 255 et seq.; Co. Litt. 32a—but it would be unfair that the dowress should get the benefit of a building lease which she could not have granted.

[COZENS-HARDY M.R. Lord Coke says the widow must take the improved value: Co. Litt. 32a. We must accept that, unless you can shew a course of authorities against it.]

The acts of the parties shew an agreement by the widow to take one third of the rents payable at the husband's death.

*Alfred Adams* (*P. O. Laurence, K.C.*, with him), for the respondent. It is said (1.) that there was an agreement to take one third of the amount of existing rents in lieu of dower; (2.) that the action is barred by the Statute of Limitations; (3.) that if dower is assigned it must be according to the value of the land at the husband's death; and (4.) that the plaintiff has released her dower by being a party to the leases. The first point is disproved by the facts. From her husband's death in 1885 till 1893 the widow was herself tenant of the land at 45*l.* a year and divided the rent in thirds after deducting expenses. In 1893 leases were granted to the plaintiff's second husband, and he either deducted one third for the plaintiff or got it back from the coheiresses. It was always a third of the rents received, not an agreed sum. The fact that the plaintiff was made a party to the leases is an admission that she was entitled to dower, and the other parties

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(1) (1858) 3 H. &amp; N. 101.

(2) (1847) 11 Ir. L. Rep. 8.

(3) (1860) 1 Dr. &amp; Sm. 284.

(4) (1841) 1 Q. B. 682; 1 G. &amp; D. 180; 6 Jur. 235.

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to the leases are estopped from denying it. The third was always paid as dower, never as in lieu of dower. There was no agreement, or if there was, it was an agreement to take one third of the rents whatever they were. In 1905 the land was taken out of the leases and the plaintiff dispossessed. If the statute applied at all, it would have begun to run from that date; but the statute is no bar to the widow's action for assignment of dower, because it is not an action to recover land, but an action to acquire the right to bring such an action. It was impossible for a widow before assignment to bring an ejectment or any other action to recover land—Park on Dower, p. 335—and therefore, it is there stated, possession of the heir would never be a bar as against the dowress. Judgments in ejectment were always for possession of a particular piece of land: Cole on Ejectment, p. 786, forms 264, 266. The phrase "tenant in dower" is only correctly used of a dowress after assignment, and is so used in the Statute of Limitations.

In *Marshall v. Smith* (1) Stuart V.-C. said it was not necessary for him to decide the point, and the opinion which he expressed upon it is merely obiter dictum. In any case it is not binding on this Court, and I submit that it is wrong. A dowress having no right of entry till her dower is assigned cannot, if an assignment is refused, maintain a possessory action: Park on Dower, p. 283; but s. 2 of the Act of 1833 and s. 1 of the Act of 1874 deal only with possessory actions and presuppose a right of action. Taking ss. 2 and 3 of the Act of 1833 together, the fair inference to draw is that the Act does not apply to an action for assignment of dower, which has a closer analogy to a partitio action. The right to recover arrears of dower stands on a different footing. Prior to the Act of 1833 there was no period of limitation for arrears of dower either at law or in equity: *Oliver v. Richardson* (2); but s. 41 provides that no more than six years' arrears can be recovered. That section, however, does not bar the right to an assignment.

[It was also contended, upon the construction of the correspondence, that there was an equitable assignment of dower to the plaintiff.]

(1) 5 Giff. 37.

(2) (1803) 9 Ves. 222.

*M. Lush, K.C.*, in reply. Sect. 2 of the Act of 1833 is not limited to actions to recover possession, for it applies to foreclosure actions: *Wrixon v. Vize* (1), approved in *Heath v. Pugh* (2); *Harlock v. Ashberry* (3); *Hugill v. Wilkinson*. (4) There is no distinction between an action to recover specific parcels of land and an action to recover that which the Court will turn into specific parcels. A partition action is different because it is not an action to recover land at all. The object of this Act is to quiet titles. An action for assignment of dower will have the effect of creating an incumbrance on the land itself and it is within the mischief of the statute; it is within the spirit and even within the language of s. 2. Sect. 3 was not intended to cut down the wide operation of s. 2, which applies to any action to obtain land: *Governors of Magdalen Hospital v. Knotts* (5); *James v. Salter*. (6)

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*Cur. adv. vult.*

March 15. COZENS-HARDY M.R. This is an action by the widow of an intestate who died in 1885. She for twenty years received from the coheirresses, the defendants, one third of the net rents from time to time received by them in respect of the intestate's freeholds. But in 1905 some of the land was, or was about to be, available for building purposes, and the coheirresses disputed her right to anything more than one third of the rental actually produced at the date of the testator's death. Eve J. has decided that the widow is entitled to have an assignment of dower with an account of rents and profits since 1905. Against this judgment the defendants appeal, and in substance they base their defence upon the Statute of Limitations and contend that, as the present action might have been brought in 1885 and as there has been no acknowledgment in writing by the coheirresses within twelve years before the issue of the writ, no relief can be given. It is true that they express their intention to continue to pay one third of the original rents,

(1) (1842) 3 D. & War. 104.

(4) (1888) 38 Ch. D. 480.

(2) (1881) 6 Q. B. D. 345.

(5) (1878) 8 Ch. D. 709, 727;

(3) (1882) 19 Ch. D. 539.

affirmed (1879) 4 App. Cas. 324.

(6) (1837) 3 Bing. N. C. 544, 553.

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but for the purposes of their argument they must assert that this is a purely voluntary payment on their part.

Now it is necessary to consider what was and is the position of a dowress both at law and in equity. At law the dowress was entitled under Magna Carta to have an assignment of dower by metes and bounds within forty days after her husband's death. Until such assignment she had no right of entry upon and no estate in any part of the intestate's land, but after assignment she became tenant in dower of the portion assigned. In order to obtain assignment she had to issue a writ of dower. If she obtained judgment, dower was assigned by the sheriff, and thereupon she could recover possession by ejectment. Such a writ did not at common law entitle her to obtain damages or an account, but by the Statute of Merton, 20 Hen. 3, a right to damages against the deforcers was given to her. If, however, the heir died before the actual assessment of damages she could recover nothing, and, similarly, if she died before assignment of dower her representatives could get nothing, and if she died after assignment, but before assessment of damages, her representatives could not get damages. This procedure at common law was obviously very inconvenient and very inadequate to protect the dowress. The Courts of Equity claimed jurisdiction in the matter, and, after considerable difference of judicial opinion, the jurisdiction of the Courts of Equity was firmly established and to such an extent that the common law jurisdiction fell practically into abeyance. But not only did the Courts of Equity assume jurisdiction, but they enlarged the widow's rights. They gave her one third of the rents and profits from the intestate's death until assignment of dower, and they granted an account of such rents and profits not only against the heir, but also against the representatives of a deceased heir; and in taking such account the heir in occupation of any part of the real estate would be charged with an occupation rent: see *Bamford v. Bamford* (1) and the form of the decree therein.

Reference is made in Fonblanque on Equity, 5th ed. vol. i. p. 23, to a manuscript note of a case decided on July 8, 1791, by Lord Thurlow of *Wakefield v. Childs* (2) in support of the

(1) (1845) 5 Hare, 203, 206.

(2) Unreported.



proposition that, though the widow should die before she has established her right to dower, equity will in favour of her personal representative decree an account of the rents and profits of the lands of which she afterwards appeared dowable. I have referred to the record of the judgment in this case, from which it appears the material facts are as follows. Thomas Childs died in June, 1779, intestate, leaving a widow, Mary Childs, and three infant coheiresses. The widow obtained letters of administration. She afterwards married and died. The bill which was filed by the coheiresses as plaintiffs against the administrator de bonis non and the representatives of the widow sought (inter alia) an account of the real and personal estate of the intestate. The decree, after directing accounts and inquiries as to the real and personal estate of the intestate, proceeded: "and it is further ordered that the said Master do inquire whether the widow was entitled to dower out of any and which of the intestate's estates and what the same amounts to." I think this fully justifies Fonblanque's statement. It follows that in the view of the Court of Equity a dowress has two distinct rights, namely, first a right to one third of the rents and profits from the death, and next a right to have dower assigned to her, the first being in no way dependent upon the second. I think in the course of the very able argument on the part of the appellants this distinction between the common law rights and the equitable rights was lost sight of, and it was assumed that unless and until assignment of dower the widow has no right. In my opinion in all Courts the widow has now two rights, or perhaps it would be more accurate to say has one right divided into two parts, and on principle I can see no ground for holding that a widow who has claimed and enjoyed as dowress her full right to the receipt from the coheiresses of one third of the net rents and profits can be prejudiced by reason of not having during that period claimed her right to an assignment. She has adopted the usual and reasonable course, and she was under no obligation to commence legal proceedings so long as the coheiresses paid her all she was entitled to receive. No laches can be laid to her charge.

But it is urged that an action for assignment of dower falls

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within the language of the Act of 1833, s. 2 or s. 24, as amended by the Act of 1874, substituting twelve years for twenty. I am unable to follow this argument. In my opinion the statute applies to an action at law or suit in equity to gain possession of a definite piece of land as distinguished from a proceeding to obtain a delimitation of parcels under which for the first time a title to a definite piece of land will be obtained. The position of a dowress before assignment is anomalous. In a qualified sense she may be regarded as co-owner with the coheirs of the rents and profits during her life or until assignment; and just as co-owners may undoubtedly bring an action for partition, although they have been for fifty years content to remain co-owners without partition, so I think the dowress may maintain her action in the circumstances of the present case. The analogy between an action for partition or for the ascertainment of boundaries and an action for assignment of dower seems to be close.

But then it is said that Stuart V.-C.'s decision in *Marshall v. Smith* (1) is opposed to this view and ought to be followed. It seems to me that the decision in that case was perfectly correct, although there are some observations of the Vice-Chancellor which I do not fully understand. The facts there were as follows. The plaintiff's husband died in 1829. She filed her bill in 1860, not having received a penny in respect of her share in the rents and profits, and she asked for an assignment of dower and also an account of the rents and profits since her husband's death. The Vice-Chancellor decided that the bill must be dismissed, but he left it in doubt whether he based his judgment on laches or on the Statute of Limitations. In my opinion the judgment was certainly right on the former ground. But I feel bound to say that in my opinion *Marshall v. Smith* (1) cannot be supported in so far as it is based upon the view that the Act of 1833 was a statutory bar to the suit.

If a widow does not for more than twelve years claim any of her rights as dowress, either to a third part of the rents and profits or to an assignment of dower, I think the Court ought to refuse her relief on the ground of laches; but that doctrine can have no application when she has up to a date less than twelve

years before writ been asserting and enjoying one part of her rights as dowress. And that is the present case.

Another point raised by the appellants was that dower ought to be assigned according to the value at the time of the intestate's death, and not according to the value at the time of the assignment. This is directly contrary to the authority of Lord Coke: Co. Litt. 32a; and, moreover, it is wholly inconsistent with the settled practice of the Court in taking an account of the actual rents and profits from the death until the assignment.

In my opinion the decision of Eve J. was perfectly correct, and this appeal must be dismissed with costs.

FLETCHER MOULTON L.J. The plaintiff here, Ann Williams, formerly wife of Lewis Davies Rees, sues for an assignment of dower out of lands left by the said Lewis Davies Rees, who died intestate in 1885. The lands passed on his intestacy to his two nieces, Mary Llewellyn and the defendant Ann Thomas. Mary Llewellyn died in 1905. The defendants are admittedly the proper persons to be sued in respect of an assignment of dower, and no defence is raised in the action, excepting that the plaintiff's claim is barred by the Statute of Limitations. The plaintiff replies that the Statute of Limitations does not apply to a claim for dower at all, and, further, that even if it did so apply the facts of this case would prevent its operating to bar her claim.

Actions such as these have become very rare in modern times, and the learning as to assignment of dower must be chiefly sought for in older authorities. The object of the action is to obtain an assignment to the widow for life of specific lands equivalent to one third of the lands subject to dower, such assignment being made by the sheriff to whom a writ for that purpose is directed. Considerable discussion has taken place as to whether the one third (which is admittedly one third in value and not necessarily in extent) must be taken as at the date of the assignment itself or as at the date of the death of the husband, but in my opinion it is clear, both on authority and reason, that the lands which the widow is entitled to have assigned to her by way of dower must represent in value one third of the total lands as they are found at the date when the sheriff actually

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makes the assignment. Dealing with authority first, we find a specific statement to this effect in Co. Litt. 32a, and if the judgment of the Court in the important case of *Doe v. Gwinnell* (1) be carefully examined, it is clear that the Court in that case was also of this opinion. Lord Denman C.J., who delivered the judgment, says specifically: "The right unquestionably attaches on all the lands to which the husband was seised during the coverture, and as certainly attaches at the period of his death. If, indeed, the assignment of dower be postponed, the value must be taken at the period of assignment." Counsel for the defendants laid much stress on expressions in the judgment which appear to favour the view that the value should be taken as at the date of the death of the husband, but that is only as contrasted with the date of the alienation in his lifetime. In my opinion the same conclusion follows also as a matter of reason and good sense. It being admitted that the right to the assignment is complete at the death of the husband, and that the assignment would be of specific lands the rents and profits of which the dowress would enjoy solely during her life, it is evident that she would be entitled to the improved value of those special lands, and not merely to such an amount of that improved value as represented their condition at her husband's death. If the assignment takes place at some later date, it seems to me reasonable that she should take one third of the then value as the fairest representation of the then value of what would have been her specific third had the assignment taken place at her husband's death. There is also a practical consideration which satisfies me that in olden times the assignment would have been made according to the value at the date of the assignment. It had to be done by the sheriff, and must have been a sufficiently difficult task under all circumstances. But it would have been impracticable for such an officer to make an assignment of one third of the value of the lands if that value had to be taken at some preceding date and not as he found them, for it would involve his taking evidence as to the alterations in value during the intervening period, a judicial proceeding for which he would be quite unsuitable, and which is not provided for in any way in



the writ. Lord Denman C.J. points this out in the judgment to which I have referred. I am therefore of opinion that the assignment must be of lands whose value is at the date of the assignment equal to one third of the then value of the total lands subject to dower.

The defendants claim that the assignment of dower comes within the language of s. 2 of the Real Property Limitation Act, 1833, which says that "no person shall make an entry or distress or bring an action to recover any land or rent but within twenty years next after the time at which the right to make such entry or distress or to bring such action shall have first accrued . . . ." In my opinion these words do not include an action for assignment of dower. We may dismiss the question of "entry or distress," for until the specific share has been parcelled out by the sheriff the dowress can make no entry, although her title is consummated at the death of her husband. But that title is to no specific lands, and it can only be changed into a title to specific lands by the act of the sheriff, so that the lands to which she becomes entitled if she brings an action to-day are not even presumably the same as they would be if she brought the action a year hence. It does not follow that they will even be the same proportion of the area (since the relative value of the various lands may change) or will represent the same value, and, of course, there is no presumption at all that they will be the same specific portions of the dowerable lands. The action therefore bears, in my opinion, no analogy to an action for possession, or even to an action for the completion of the title to specific lands, as in a foreclosure action. It is an action to have lands set apart for the plaintiff out of a larger area so as to give a right of possession in those specific lands which does not exist until after judgment has been given and the writ executed. If after such an assignment the dowress neglects for the statutory period to obtain possession of those lands the Statute of Limitations applies, and this is clearly indicated by the presence of "tenant in dower" in the definition clause.

But counsel for the defendants rightly claims that there is authority in his favour on this point. In the case of

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*Marshall v. Smith* (1) Stuart V.-C. held that the Statute of Limitations applies to such an action. But when his judgment is examined it will be found that he states carefully that the point is not necessary for his decision, so that this part of the judgment can hardly claim any higher status than a dictum, and the decision itself does not rest on the statute. But apart from this I am of opinion that the view which the learned Vice-Chancellor undoubtedly held on the point does not rest on sound grounds. If I am right in my view of the action for assignment of dower, it is more closely akin to a partition action between two tenants in common than to any action to enforce a possessory title. By such a partition action a person acquires a separate and exclusive title to certain specific lands which he had not before, but which he had the right to obtain. The analogy between this and the action for assignment of dower is obvious, though, of course, the rights are not identical. No one would say that one of two tenants in common could not bring a partition action after the land had been enjoyed in common for more than the statutory period. Yet it could with truth be said of such a tenant that he was seeking to acquire a title to specific lands which he could have acquired at a time that was distant more than the statutory period. The answer both in the case of a partition suit and in an assignment of dower is that it is not an action to recover specific lands, but to obtain a separation or apportionment of lands for the purpose of obtaining a possessory title to a specific portion of such lands, and that such an action is not within the statute, which relates only to the enforcement or completion of title to lands already specific. With all respect, therefore, to the view of the learned Vice-Chancellor, I cannot think that his dictum is correct.

Counsel for the defendants has urged strenuously that a claim for dower is within the mischief aimed at by the Real Property Limitation Act, 1833, and that therefore we ought to hold the language of s. 2 to be wide enough to cover it. This is a dangerous argument. If it was not in the contemplation of the Legislature at the time that the legislation was framed (which is shewn by its not using words which are apt to include it) it

would be most unfair to stretch the meaning of the words used so as to make them include it. In all cases the remedy requires to be safeguarded, and sections effecting this are found in the Act which relate to the cases which were in the contemplation of the Legislature. But if by reason of zeal to suppress the mischief we extend the application of the Act and make it include cases not in its contemplation, we cannot expect to find any of those necessary safeguards which are expressed therein in the cases to which the language was intended to apply. For instance, it might happen that the claim for dower had been admitted by the heir without controversy, and that accordingly one third of the rents and profits had been paid by him as dower to the widow for a series of years equal to or exceeding the statutory limitation. Counsel for the defendants admitted that on his argument the heir could then refuse to pay anything on account of dower and the widow would be without relief, because there are no words in the saving clauses of the Act which make the recognition of the right and the payment of all to which the widow would have been entitled under her claim for dower effective to prevent the period from running. I have myself no doubt whatever that had the statute used language in s. 2 wide enough to include a claim for dower it would have been careful to prevent such an injustice as this. I therefore decline to read the words relating to the mischief in any wider sense than they will fairly bear.

But even if I came to the conclusion that an action of dower was within the language of s. 2 of the Real Property Limitation Act, 1833, I should still hold that on the facts of this case the plaintiff was entitled to succeed in the action. To my mind the facts of the case afford overwhelming evidence in favour of the inference which has been drawn by the learned judge in the Court below, namely, "that the parties have adopted the course which is almost universally adopted of collecting rents or having the rents collected, paying out of the gross rents the proper outgoings chargeable against them, and dividing the net residue into thirds, the widow taking one third and the heir or heiress taking the remaining two thirds."

The evidence as to the consistent assertion of the right of

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dower and the regularity of the payment of the one third of the net rents and profits as and for dower is so complete that I need not dwell on it. But to my mind the leases which were entered into not only support the inference drawn by the judge, but shew that on faith of such an arrangement acts of a permanent character were done which made the arrangement much more than a day to day arrangement. It will suffice to take the lease of September 28, 1893. In this lease the plaintiff is joined with the two coheiresses as lessor, and the first recital reads as follows: "Whereas the lessors being seized in fee simple in possession of the land hereditaments and premises hereinafter expressed to be hereby demised subject to the dower therein of the said Ann Williams . . . ."; and the "lessors" demise the estate. The covenant to pay the rent is no doubt made with the coheiresses, but this does not in any way militate against the existence of the arrangement which I have described. But the covenant for quiet enjoyment is made by all the lessors, and the power to resume portions of the lands for the purpose of building thereon, or for any other purpose, is also reserved to the "lessors." In my opinion this lease shews clearly that the parties were acting on the agreement I have referred to, and that on the faith of that agreement the plaintiff entered into a lease which would pro tanto affect her right to have a portion of the land assigned to her specifically. The plaintiff was bound by this agreement and would not have been entitled to repudiate it and to bring an action for assignment of dower if it had not been that the defendants repudiated it themselves and therefore left the plaintiff to her rights. But up to the moment that the defendants so repudiated it the plaintiff had during the continuance of the agreement no right to bring an action for assignment of dower, and therefore the right to bring the present action did not accrue until the year 1905.

It must be borne in mind that such a method of assessing dower is that which is followed in the great majority of cases as being more convenient and more equitable to both parties. And when the right to dower has been asserted throughout, and for a long series of years accounts have been taken of the rents and profits and one third of those rents and profits has been paid and



received specifically as dower, the Court is entitled, and, I think, bound, to hold that the parties have during that period paid and received dower in that form by virtue of an agreement to that effect evidenced by their conduct, and that accordingly the widow's right has been suspended during the continuance of that course of conduct, but revives when the heir refuses to pay the third any longer.

I am therefore of opinion that the decision of the learned judge was correct and that this appeal should be dismissed with costs.

BUCKLEY L.J. The material facts here are quite short. The plaintiff's husband died intestate on August 24, 1885, and thereupon the plaintiff became entitled to dower. During the next twenty years the coheiresses from time to time paid to the widow one third of the rents for the time being. The writ in this action was issued on August 3, 1907. In the year 1893, which is more than twelve years before the issue of the writ, the widow concurred with the coheiresses in three deeds. These were no doubt acknowledgments of her right to dower within s. 14 of the Act of 1833, but, inasmuch as they were more than twelve years before action brought, nothing turns upon these instruments for that purpose. The only material observation upon them is that although the widow concurred the rents were reserved to the coheiresses, and in the case of the conveyance of December 2, 1893, the purchase-money of 50*l.* is expressed to be paid to the coheiresses. The relation of lessor and lessee did not exist between the widow and the tenant. As between the coheiresses and the widow no inference is to be drawn from those instruments as regards possession by the widow. A question was suggested as to estoppel. As between the coheiresses and the widow on the one hand and the lessee on the other no doubt an estoppel would arise, but I am clear that there was no estoppel between the coheiresses and the widow arising from those deeds. Subsequently, and to a date well within the period of the statute, one third of the rents was from time to time paid to the widow. There are documents signed by Mr. Thomas, the husband of one of the coheiresses, which might amount to

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acknowledgments within s. 14 of the Act of 1833, but, inasmuch as they are not signed by the coheiresses themselves, no point really arises upon the question of acknowledgment. The questions to be decided are, first, whether the Act of 1833 applies to the case of an action to enforce an assignment of dower, and, secondly, if that question be answered in the affirmative, then whether that which took place between the coheiresses and the widow amounted to an appropriation to the widow of one third of the rents and profits as distinguished from an assignment to the widow by metes and bounds of one third of the lands.

The first question is one of great interest and, I think, much difficulty, more particularly having regard to the decision of Stuart V.-C. in the year 1865 in *Marshall v. Smith*. (1) It has been argued, and, I think, successfully, that while on the one hand the expression "to recover any land" in s. 2 of the Act of 1833 does not mean regain something which the plaintiff previously had and has lost, but means "obtain any land by judgment of the Court," yet it is not limited to the meaning "obtain possession of any land by judgment of the Court." For it has been held that a mortgagee's action for foreclosure is an action for the recovery of land within the Act. A foreclosure action is not an action to obtain possession, but is an action whose principal purpose is to convert that which in a Court of Equity was but personal estate of the mortgagee into real estate of the mortgagee. It is an action to enable him to hold the legal estate already vested in him discharged from the right of the mortgagor to redeem him. But it is obvious that such an action differs in most material respects from that of a dowress for assignment of dower. The mortgagee is suing to recover land in the sense of converting what was a redeemable into an irredeemable estate in land. His action is brought with reference to defined parcels, namely, those parcels comprised in his mortgage. The action of the dowress is not an action to recover possession of any defined parcels of land, nor an action to convert a redeemable into an irredeemable estate in defined parcels of land. It is an action whose primary purpose is to obtain the definition of parcels, and by the judgment in the action and the

(1) 5 Giff. 37.

consequent proceedings to obtain for the first time the estate of a tenant in dower in parcels thus for the first time identified. The dowress does not sue to recover any particular land, but to obtain an adjudication upon the question as to what land shall during her lifetime be hers in severalty. The action of the dowress resembles rather an action for partition or an action to determine boundaries, although the analogy is not complete. The right to sue for partition is, of course, not limited to any particular number of years after the death of the testator from whom the lands were derived, unless the plaintiff has meantime been excluded from possession. There is no question in such a case of any adverse possession or of quieting of title as between the plaintiff and the parties in possession. The case of the dowress is to some extent similar but not the same. The heir is not and until after assignment of dower cannot be in possession adversely to the dowress, for the dowress is not a person who, except by way of action to assign dower, is entitled to possession of the estate or any part of the estate out of which she is dowable. Her action cannot, I think, in any reasonable sense be held to be an action to recover land in the sense of either obtaining possession of land or, as in the case of the mortgagee, of enlarging the title to land. It is true that s. 1 of the Act refers to a tenant in dower and s. 41 limits the period within which an action may be brought for arrears of dower. As regards the former, directly there is a tenant in dower, that is to say, a tenant who by assignment of dower is entitled to possession of land, a case arises with which the considerations upon which I have dwelt have nothing to do. And as regards s. 41, that has to do, not with the widow's right to have an assignment of dower, but with her other co-existing right to have, as regards the past, an account of the rents of the lands out of which she is dowable. To this extent I agree that the rights in respect of dower are contemplated by the Act. But these do not, I think, operate to enlarge the meaning of the words "action to recover land" in s. 2 of the statute.

It is a very common, and I believe the most common, way to deal with the question of dower that as between the heir and the widow the former should account to the latter for one

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third of the rents without a formal assignment of dower ever being made. If the statute applies to the action to assign dower, it would result that, if for twelve years and upwards the heir has so paid to the widow the one third of the rents, and if at the expiration of that time he should refuse to pay further, she would be without remedy, unless she had protected herself by an acknowledgment signed under s. 14 of the Act. In the present case, if, which is not the fact, the coheirresses repudiated the right of the widow to anything further, she would, if this appeal succeed, be wholly deprived of any right to dower in future. This is, I think, a strong consideration against a construction of the Act of Parliament which would lead to such results. On the other hand it is not unreasonable to suppose that it was not thought necessary to provide a limitation upon actions to assign dower, seeing that the right of action necessarily comes to an end with the life of the dowress and that in most cases the surviving widow is not likely to live for such a number of years as to require the enactment of a Statute of Limitations. By these considerations I am led to the conclusion that the statute does not apply to the widow's action to assign dower.

But even if it does, and it results that after the period of the statute the dowress cannot recover in an action for assignment by metes and bounds, it does not, I think, follow that when the heir has paid her one third of the rents and profits down to a recent date (and the material date, I think, would be by analogy to the statute a date within twelve years of action brought) she is precluded from claiming her one third of such rents and profits for the future. If the decision of Stuart V.-C. in *Marshall v. Smith* (1) were a decision to the contrary, I should be unable to agree with it; and if he intended to hold that the Act of 1833 extended to the widow's action to assign dower, I should be equally unable to agree with it. But seeing that the facts in *Marshall v. Smith* (1) were that for thirty-one years the widow had received no rents and taken no proceedings, the decision, if it was rested upon laches, may well have been right. But it has then no bearing upon the present case.



Assuming, however, that I am wrong in thinking that the Act does not apply, there is another ground upon which in this case the widow is, I think, entitled not to the same but to a similar remedy. There are cases in which the widow cannot have dower assigned her by metes and bounds. For instance, if her husband was not solely seised, but was seised in common, there, the widow cannot be endowed by metes and bounds: see Co. Litt., 32a, 37b. In such cases dower may be assigned, not by contract, for that is not, I think, the real effect of that which is done, but by the heir accounting in point of fact to her from time to time for one third of the rents. That seems to me to be the course which was taken in this case. The rents varied (by a very small sum, it is true), but whatever was the amount of the rents the coheiresses accounted to the widow for one third. If the statute applied so that she could not now bring her action for assignment of dower by metes and bounds, she would still, I think, be entitled to rely upon the whole course and conduct of the parties during the last twenty years, and would upon that footing be entitled to one third of the rents.

The only remaining question is whether she is entitled to one third of the lands or of the rents as at the death of her husband or one third of the lands or of the rents as at the date of the assignment. I think it clear, from the passage in Co. Litt. 32a, that she is entitled to one third as at the date of the assignment.

It results that in my judgment the order under appeal is right and that the appeal should be dismissed with costs.

Solicitors: *Sharpe, Pritchard & Co., for Jeffreys & Powell, Brecon; Bell, Brodrick & Gray, for C. & W. Kenshole, Aberdare.*

H. B. H.

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NUSSEY v. PROVINCIAL BILL POSTING COMPANY  
AND EDDISON.

[1907 N. 1176.]

*Building Estate—Restrictive Covenants—"Offensive" Trade or Business—Bill-posting—Advertisement Hoarding—Building—Mandatory Injunction.*

The plan and conditions of sale of a residential estate provided that all the lots should be subject to certain restrictive covenants for the general benefit of the estate, and, amongst others, that the purchasers were not to erect any "building" for manufacturing purposes or "for the carrying on of any noisy, noisome, offensive or dangerous trade or calling." A lessee from one of the purchasers of two lots had erected along the boundary of the land where it adjoined the plaintiff's plot a hoarding of a permanent nature, 156 feet long and 15 feet high, and covered the hoarding with advertisements. On an action by the plaintiff for a mandatory injunction for the removal of this hoarding:—

*Held* by Cozens-Hardy M.R. and Buckley L.J. (affirming the decision of Neville J.), that this hoarding was, within the meaning of the above covenant, a "building" upon which the trade of bill-posting was carried on, and that this was an "offensive" trade to the owners of the adjoining plots, and, consequently, that the plaintiff was entitled to a mandatory injunction.

But *held* per Fletcher Moulton L.J., that "offensive" meant something ejusdem generis with "noisy, noisome and dangerous," i.e., some trade the carrying on of which physically interfered with the comfort of a neighbour, and that the hoarding was not a "building" within the covenant.

APPEAL from a decision of Neville J.

The main question raised by this appeal was whether the erection of an advertisement hoarding was a breach of a restrictive covenant for the general benefit of the purchasers of the various plots on a residential estate not to erect any building for manufacturing purposes, or "for the carrying on of any noisy, noisome, offensive or dangerous trade or calling."

The facts so far as material were shortly as follows: The plaintiff and the defendant Eddison were respectively owners of plots of land which originally formed part of the Headingley Gardens estate in the city of Leeds. This property was offered for sale in 1859 as a residential building estate in twenty-eight

lots, subject to a general sale plan and subject to certain conditions of sale which provided for all the lots being subject to certain restrictive stipulations for the general benefit of the estate. By the original plan it appeared that the various lots were to be used for the erection of houses of a certain value, with a lodge or manservant's house, and at a substantial distance from the roads as laid out on the plan. The ground also was so planted and arranged and was disposed of on such conditions as to shew, in the opinion of the majority of the Court, that residential houses were intended to be built. The plaintiff was the owner of lot 19, and the defendant Eddison of the adjoining lots 20 and 21. The conveyance to the defendant Eddison contained, pursuant to general conditions of sale, a covenant by Eddison to fence off lots 20 and 21 from the road, that such fence should consist of a dwarf wall with iron palisading, and gates either of wood or iron, "and that no bricks should at any time be burnt upon the said lots or any of them and no building should be erected thereon to be used for manufacturing purposes nor for the carrying on of any noisy, noisome, offensive, or dangerous trade or calling, nor as a public-house or retail shop, and no steam engine should be erected thereon."

In 1907 the defendant Eddison agreed to lease to the defendant company the exclusive right of posting bills and exhibiting advertisements upon the land in question, the defendant company having the right to erect a bill-posting hoarding thereon. In pursuance of this agreement the defendant company erected along the boundary of the land where it immediately adjoined the plaintiff's premises a hoarding of a permanent nature 156 feet long and 15 feet high, and covered the hoarding with advertisements. The plaintiff claimed that the erection of the hoarding was a breach of the covenant to fence and also a breach of the covenant against erecting any building for the purpose of carrying on any offensive trade or calling. He accordingly brought the present action to obtain a mandatory injunction to compel the defendants to pull down the hoarding.

There was evidence on behalf of the plaintiff that this hoarding, besides the litter and waste-paper that came from old

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advertisements, was a great disfigurement to the neighbourhood and a legitimate ground of offence to the plaintiff and other adjoining owners.

Neville J. held that the hoarding was a fence other than a fence provided for by the covenant and was also a building for the purpose of carrying on an offensive trade. He accordingly granted the injunction asked for by the plaintiff.

The defendant Eddison appealed.

*Danckwerts, K.C.*, and *Austen-Cartmell*, for the appellant. This hoarding is not an "offence" within the meaning of this covenant. Advertising is not an offensive trade, neither is this hoarding a "building": *Boyce v. Paddington Borough Council* (1); *Paddington Corporation v. Attorney-General* (2); *Foster v. Fraser* (3); *Wilson v. Queen's Club*. (4) It may be an erection, but it is not a building.

[COZENS-HARDY M.R. referred to *Wood v. Cooper*. (5)]

In that case the word relied on was "annoyance"; that word is not in the present covenant. The language of this covenant shews that some kind of message was contemplated, and the word "offensive" must be read as ejusdem generis with the other words "noisy, noisome, and dangerous." Bill-posting is not a noisome or offensive trade. "Public-house" is specially mentioned because that is not necessarily an offensive trade: *Jones v. Thorne*. (6)

[BUCKLEY L.J. The question here seems to be whether this trade as carried on on this hoarding is not "offensive" in this residential neighbourhood to these particular residents, the plaintiff and adjoining owners.]

An interference with the pleasurable enjoyment of the view from their windows or grounds is not an "offence" to the neighbouring owners. In *Tod-Heatly v. Benham* (7), the words were "annoyance and grievance." It cannot be said of a hoarding that it will offend against any sense; the utmost that

(1) [1903] 1 Ch. 109.

(2) [1906] A. C. 1.

(3) [1893] 3 Ch. 158.

(4) [1891] 3 Ch. 522.

(5) [1894] 3 Ch. 671.

(6) (1823) 1 B. & C. 715.

(7) (1888) 40 Ch. D. 80.



can be said against it is that it is a blot on the landscape. We also say that it is not a "fence" so as to be a breach of the covenant as to fencing.

*Buckmaster, K.C.*, and *Errington*, for the respondents, were only called upon on the question whether this hoarding was a building for an offensive trade within the covenant.

The general estate plan in effect made a representation to every intending purchaser that this was to be a residential estate, and this covenant must therefore be construed having regard to this representation. A public-house, retail shops, and manufacturing businesses are expressly prohibited; therefore the covenant must be interpreted with due regard to the residents on this estate, and the Court must see whether what is being done is "offensive" to them. "Offensive," therefore, must be something that reasonably causes offence to the persons who have the benefit of this covenant. A similar covenant was considered in *Earl of Pembroke v. Warren* (1), where the word was construed as meaning something causing well-founded and reasonable annoyance and was not restricted to something unpleasant to the eye, ear, or nose. This hoarding is an offence to the particular residents on this estate; it offends them as reasonable persons and on reasonable grounds. [The definitions of "offensive" in the Standard Dictionary and in the Century Dictionary were also cited.]

Bill-posting was restrained by injunction in *Heard v. Stuart*. (2) [*Long Eaton Recreation Grounds Co. v. Midland Ry. Co.* (3) was also referred to.]

*Danckwerts, K.C.*, in reply. *Bonnett v. Sadler* (4) seems to shew that, as only offensive trades are prohibited, some trade not offensive may be carried on. The judgments in *Earl of Pembroke v. Warren* (1) all seem to shew that something in the nature of physical discomfort is necessary in order to prove a breach of a covenant of this kind. It is the trade that is aimed at by this covenant, not the building, and advertising is not an offensive trade.

*Cur. adv. vult.*

(1) [1896] 1 I. R. 76.

(2) (1907) 24 Times L. R. 104.

(3) [1902] 2 K. B. 574.

(4) (1808) 14 Ves. 526.

C. A. April 2. COZENS-HARDY M.R. The judgment I am about to  
1909 read is that of Buckley L.J.

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Except that the learned judge suffered himself to be led astray into treating depreciation as per se evidence of offensive trade, I think he was right on every point. I think this hoarding is both a "fence" and an "offence," or, to put it more accurately, that the hoarding is a fence and that the carrying on upon it the trade of bill-posting is a use of the hoarding for an offensive trade or calling.

As to the hoarding being a fence, it is a fence and the only fence "against the side of Cardigan Road." The obligation was to erect and maintain against the side of Cardigan Road, that is to say on that side of the lot, a fence consisting of a dwarf wall with iron palisading and so on, and no other kind of fence. There is no substance in saying that the hoarding is set back at one end two feet nine inches and at the other end three feet from the ultimate boundary of the plot, and that being erected in a straight line it is set back six feet in the middle of the plot. It is, I think, a fence against the side of Cardigan Road. It results that the first part of the order under appeal is right.

Next I hold that this hoarding is within these conditions a building, and that there is carried on upon this building the trade or calling of a bill-poster. I by no means affirm that in every contract a hoarding is a building, but this hoarding is, I think, a building within these conditions. It is a building erected for the purpose of the trade of bill-posting. It would never have existed except with a view of that trade. The condition does not contain the word "therein" or any such word. This is a building upon which the trade or calling of bill-posting is carried on. Bill-posting is a trade or calling—that seems to me incapable of dispute. The only remaining question is whether this trade or calling is within this condition offensive. The relevant facts here are that as appears by the original plan these plots were to be used for the erection of houses lying at a very substantial distance from the road, and contemplated as being houses which may have a lodge or a manservant's house. The ground was so planted and so arranged and was disposed of on such conditions as to shew, I think, that residential houses

were intended to be built. The relevant provision then is, first, that no building erected on the land shall be used for either (1.) manufacturing purposes or (2.) as a retail shop. The manufacturer and the retail shopkeeper both, as I conceive, carry on a trade. As regards trades, then, it remains that the thing not forbidden is wholesale trade not included within the term "manufacturing." Upon callings and upon trades otherwise permitted there is a veto expressed in the words upon which the question arises. The relevant provision is that they shall not be "offensive." The context in which that word occurs shews that the condition forbids (1.) noisy trades or callings which offend the ear, (2.) noisome trades or callings which offend the nose, (3.) trades or callings which expose a man to danger, and (4.) trades or callings which are "offensive." In this context this may mean offensive not to the ear, not to the nose, nor by way of danger, leaving as an obvious meaning offensive to the eye. It is not confined to this, but I see no reason why it should not extend to it. Further, the word "offensive" is, I think, to be construed relatively to the person contemplated as enjoying the benefit of the stipulation, that is to say, relative to such a person as would be the purchaser of such a plot upon such an estate as this estate is by the conditions and plan shewn to be. The question, therefore, is whether the trade or calling of a bill-poster carried on upon a hoarding 156 feet long and 15 feet high, carrying with it such disfigurement and such litter by waste-paper and so on as would result from the employment of the site for such a purpose, can properly be called offensive, that is as legitimately furnishing ground of offence to a reasonable person who became a purchaser of a lot on this estate. A man may be legitimately offended by an annoyance which does not amount to a legal nuisance. The evidence here is not strong, but it is sufficient, I think, to shew that this plaintiff and the other residents on the estate are actuated by considerations founded not in æsthetic sensitiveness, but in reasonable good sense in regarding such a hoarding as this occupied under an agreement for seven years for the purpose of posting bills as a legitimate ground of offence to them as owners of adjoining plots. It results that in my judgment the second part of the order under appeal is also right.

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C. A.      The appeal therefore, in my judgment, fails and must be dismissed with costs.  
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I entirely agree with the judgment I have just read.

FLETCHER MOULTON L.J. I agree with the judgment just delivered as far as it relates to the hoarding being a breach of the covenant as to fencing, and therefore I concur in the appeal being dismissed. But I do not agree with that judgment so far as it relates to its being a breach of the covenant as to erecting buildings for the carrying on of certain trades, and as the decision on this question involves, in my view, an important point of law, I propose to give my reasons for coming to a different conclusion.

This case is an ordinary instance of the sale of plots included in a building scheme. The conditions of sale set forth clearly what covenants as to the user of the land are to be inserted in the conveyances of the various plots, and such covenants have been duly inserted. None of the purchasers can say that they expected the conveyance of his neighbour's lot to be in any other form than it in fact is. The plaintiff is the owner of one of the plots, and his right to enforce these covenants so far as they are negative covenants may be taken to be admitted.

That being so, it appears to me that the existence and nature of the building scheme are wholly immaterial for the purposes of our decision. They are material to establish the right to enforce covenants contained in conveyances to which the plaintiff is not a party and which therefore he could not under other circumstances enforce. But they are only material for that purpose. They do not affect the construction or scope of those covenants. The utmost they can do is to give to the plaintiff the right to enforce those covenants in as ample a manner as if he were the vendor, that is, an actual party to the conveyance, the validity of the covenants and their being binding on purchasers being unquestionable. When these matters are admitted, as I take them to be in this case, the details and even the existence of the building scheme become irrelevant, and it appears to me to be as illegitimate to look at the documents relating to it, for the purpose of construing the covenants, as it would be to look at any other foreign document.



It by no means follows from the existence of a building scheme that a third party has as ample a right to enforce negative covenants in a conveyance as if he were a party to it. But he cannot have ampler rights; and if we construe the covenant as it would properly be construed in such a context and admit its full validity and the right of the plaintiff to enforce it, as if he were a party to the deed, we have taken the maximum of the obligations under which the purchaser places himself, or—regarding it from the other point of view—the maximum of the rights that any person whatever can have against him by reason of the conveyance. I propose to assume that the plaintiff is entitled to enforce this maximum. What it amounts to is, as I have pointed out, a pure question of construction of the language of the conveyance.

The covenant which we have here to construe reads as follows: “And that no bricks should at any time be burnt upon the said lots or any of them and no building should be erected thereon to be used for manufacturing purposes nor for the carrying on of any noisy noisome offensive or dangerous trade or calling nor as a public-house or retail shop and no steam engine should be erected thereon.” The first thing to observe here is that there is no covenant that the land shall be used for residential purposes only. It is true that there are restrictions on the value and number of houses built upon it, and they must not come beyond a certain frontage line. But this, if it has any effect, seems to me to emphasize the absence of a covenant that the land shall be used for residential purposes only. Next it will be seen that trade user is only partially excluded. Excepting brick-burning, no trade user is excluded except so far as it requires buildings, and even then wholesale trades are not excluded unless they are “noisy noisome offensive or dangerous.” Thus the purchaser might let the ground to a laundry for a drying ground or might use the ground for livery stables without any breach of his covenants. He must keep the Cardigan Road fence uniform with that of his neighbours, namely, a dwarf wall with iron palisading, but that is all.

The argument on behalf of the plaintiff is that exhibiting posters is an “offensive” trade. Even if the word were used

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alone, without any context serviceable to guide us as to its meaning, I personally should have no doubt that this construction was unsustainable. But it occurs in company with the three other descriptive adjectives noisy, noisome, and dangerous, and in my opinion means something ejusdem generis with them, namely, some trade the carrying on of which physically interferes with the comfort of a neighbour. And this is, in my opinion, its ordinary and natural interpretation as well as its recognized meaning in such covenants. It has nothing to do with the purely æsthetic susceptibilities of possible owners of adjacent land. I cannot help protesting against the process of arriving at the true meaning of words in common use by etymological reasoning based on their derivation. We have no right to say because offensive is an adjectival derivative from the verb offend that therefore whatever offends is rightly termed offensive. A man by tactless language in a speech may give just offence, but that would not justify one in saying that he was guilty of using offensive language. The word "offensive" as applied to trades has a fairly defined meaning of its own, though it would no doubt be interpreted more widely in a high-class residential neighbourhood than in a case like the present, where at the time of the sale there were no houses, and which it was not intended to restrict to residential purposes. In such a case as the present I can see no reason for giving to the word any but its ordinary and well-known meaning when applied to trades, which is strictly ejusdem generis with noisy, noisome, and dangerous, and if we do so the trade of exhibiting posters is clearly outside the covenant.

I am also of opinion that the plaintiff's construction of the covenant is unsustainable on another ground. A "hoarding" is not in my opinion a "building" within the meaning of the covenant. It is obvious that no one would in common parlance so style it, and although I agree that in certain cases it may be included in the term, it can only be so by reason of some special context or some peculiarity in the subject-matter in connection with which it is used. A covenant to maintain and keep in repair all buildings erected on the land would not compel a leaseholder to keep standing for the whole of his term any

hoarding he might erect perhaps for a very temporary purpose. There is nothing here which to my mind gives any justification for ascribing any unusual meaning to the word "building" so as to make it include a mere screen. On the contrary, the context, to my mind, points clearly to the intention to use it in its ordinary sense. It contemplates the building being "used for manufacturing purposes" or "for the carrying on of" certain trades or callings or "as a public-house or retail shop." It is only to buildings to be used for such purposes that the covenant refers, and such language appears to me to negative any suggestion that the word can be used in any sense wider than its ordinary meaning. I certainly cannot be party to giving to this covenant a construction which would forbid the purchaser from allowing posters to be displayed on his back wall (should he choose to erect one on the Church Street side of his property) on the ground that his doing so rendered him guilty of erecting a building to be used for a noisy, noisome, offensive, or dangerous trade.

Solicitors: *Surr, Gribble, Nelson & Oliver, for Nelson, Eddisons & Lupton, Leeds; Vincent & Vincent, for North & Sons, Leeds.*

W. C. D.

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*Patent Action — Practice — Particulars of Objection — Want of Novelty — Sufficiency—Rules of the Supreme Court, 1883, Order LIII.A, r. 18.*

Rule 18 of Order LIII.A, which deals with particulars of objection as to want of novelty in a patent action, distinguishes between a patent for a process and a patent for machinery or apparatus, and requires less detailed particulars in the former case than in the latter; and where prior user is alleged and the plaintiff's patent is for a process only, if the defendant has satisfied the requirements of the rule as to names, places, and dates, he will only be required in addition to give a description sufficient to identify the alleged prior user: he will not be required to give particulars of the apparatus employed by him in working the process relied upon by him as an anticipation nor to allow inspection of any samples in his possession of substances treated by that process.

THESE were two appeals, one from an order of Neville J., and the other from an order of Swinfen Eady J.

The question raised by both appeals was as to the sufficiency of certain particulars of objection delivered by the defendants in a patent action under Order LIII.A, r. 18. (1)

(1) Order LIII.A, r. 18, provides:

"If one of the objections taken in the particulars of objections be want of novelty, the particulars must state the time and place of the previous publication or user alleged, and if it be alleged that the invention has been used prior to the date of the patent, must also specify the names of the persons or person who are alleged to have made such prior user and whether such prior user is alleged to have continued down to the date of the patent, and if not, the earliest and latest dates on which such prior user is alleged to have taken place, and shall also contain a description (accompanied by drawings if necessary) sufficient to identify such alleged prior user, and if such user relates to any machinery or apparatus

shall specify whether the same is in existence and where the same can be inspected.

"No evidence at variance with any statement contained in the particulars shall be given in support of any objection, and no evidence as to any machinery or apparatus which is alleged to have been used prior to the date of the patent and which is in existence at the date of the delivery of the particulars shall be receivable unless it be proved that the party relying on such prior user has, if such machinery or apparatus be in his own possession, offered inspection of the same, or if not in his own possession, has used his best endeavours to obtain inspection of the same for the other parties to the proceedings."



The plaintiffs were the assignees of a patent No. 12,778 of 1902 for improvements relating to the concentration of ores, and the action was brought for an injunction to restrain an alleged infringement of the patent and for consequential relief.

The invention was communicated from abroad by Alcide Froment, of Traversella, Italy, and it was thus described in the complete specification :

“This invention has reference to the concentration of metalliferous ores and earths for the purpose of separating and recovering therefrom the finely divided metal or metallic compounds, and consists of a modification of what is known as the oil process of ore concentration.

“The following phenomena, studied by the inventor, have served as the basis of the process which forms the subject of this invention.

“1. When the natural sulphides reduced to powder are moistened by a fatty substance, they have a tendency to unite in spherules and to float upon the surface of water.

“2. This tendency is simply retarded by the specific weight and opposed by the gangue which imprisons the moistened sulphides in its pulverulent mass.

“3. If a gas of any kind is liberated in this mass, the bubbles of the gas become covered with an envelope of sulphides and thus rise readily to the surface of the liquid where they form a kind of metallic magma.

“4. The formation of these metallic spherules is singularly active if the gas is in a nascent state.

“Thus for example if in a test tube there is placed ten grammes of sulphuretted copper ore with its gangue, a gram of limestone, the whole reduced to powder, and if there is added thereto thirty grammes of water, a few drops of sulphuric acid and a thin layer of ordinary oil, and the mixture then agitated for a brief space, the whole of the copper-pyrite will instantly rise to the top of the liquid. The metallic spherules, pressed one against the other, will become grouped in a magma clearly separated from the rest of the liquid. If the limestone is in excess or readily attackable, the rapidity of the separation is so great that the copper-pyrite is forcibly projected outside the

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vessel. There is therefore a proportion to be sought for a given ore and limestone.

“The small quantity of gangue mechanically conveyed gradually falls and the sulphides remain in a state of almost complete purity. Such is the principle.

“Thus the rapidity of the formation of the spherules and their ascension is in direct ratio to the quantity of gas produced in a given time.”

Then followed a number of examples, and in conclusion the patentee declared that what he claimed was—“The herein described process for the concentration of metalliferous ores and earths which consists in mixing finely powdered ore or earth with water, adding a suitable oil, and then liberating gas in the mixture substantially as described and for the purpose specified.”

The defendants by their defence denied the infringement and disputed the validity of the patent for the reasons given in the particulars of objection delivered therewith. Paragraph 2 of these particulars stated that the invention was not new at the date of the patent, but had been published in this country prior to such date, “(d) By the public user by the Ore Concentration Syndicate Limited at their works at Glebe Road Kingsland Road in the county of Middlesex in the concentration of metalliferous ores by mixing the finely powdered earth with water adding a suitable oil and liberating a gas namely carbonic acid in the mixture upon the several dates hereinafter mentioned.” Then followed in a tabulated form a list of the dates of the various experiments (all being in the years 1901 and 1902), a description of the ore used on each occasion by reference to the mines from which it was produced, and detailed particulars of the proportion of water to ore, of the percentage of sulphuric acid present in the water, and of the percentage of sulphuric acid on the weight of ore treated. And the particulars concluded as follows: “The ore in each case contained a carbonate or carbonates and the water used was the ordinary tap water supply at the said works. The sulphuric acid by acting upon the carbonate or carbonates in the ore and the alkaline carbonates in the tap water liberated the carbonic acid.”

On November 5, 1908, the plaintiffs took out a summons for further and better particulars of objections, and as to par. 2(d) they asked for particulars of the nature of the ore and its analysis, if known to the defendants, in every case subjected to treatment, and whether the defendants had in their possession samples of the several ores so treated and whether they would allow the plaintiffs to have inspection of such samples and to make tests therewith.

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On November 23 Neville J. refused the application so far as it related to par. 2(d).

On December 8 the plaintiffs took out a second summons for further and better particulars of objections as to par. 2(d) and asked for particulars as to the kind of oil used on each of the occasions mentioned in the said paragraph; the quantity of oil and percentage of ore so used; the quantity—approximately stated—of the carbonic acid gas liberated on each occasion in proportion to the quantity of concentration recovered; and finally they asked for a sufficient description of each of the said users as to apparatus, proportions, time, and other matters to enable the plaintiffs to repeat the user with a view to obtaining a similar result.

On February 15, 1909, Swinfen Eady J., who was then taking chamber work, refused the application, but on February 26 the learned judge, upon a motion to discharge the order of February 15, reconsidered the matter and ordered that the defendants should give particulars of the kind of oil used on each occasion, of the quantity of oil and percentage to ore, and of the nature of the apparatus.

The plaintiffs appealed against the order of Neville J., and the defendants appealed against the order of Swinfen Eady J. The two appeals were heard together.

*T. Terrell, K.C.*, and *J. W. Gordon*, for the plaintiffs. The plaintiffs are entitled to know from the particulars what the experiments were which are relied upon by the defendants as constituting an anticipation, and the particulars supplied do not give them that information: *Holliday v. Heppenstall* (1); *Nettlefolds v. Reynolds*. (2) Those cases, though decided under the old

(1) (1889) 6 Rep. Pat. Cas. 320.

(2) (1891) 8 Rep. Pat. Cas. 410, 417.

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practice, are suggestive because the objects of requiring particulars of objection as to novelty are the same, namely, to prevent surprise, to enable the plaintiff to prepare his case, and to minimize expense. The only difference is that the new rule is more stringent. The information supplied is not sufficient, if put before a chemist, to enable him to tell the plaintiffs whether there has been a complete anticipation or not. If there were a complete anticipation the plaintiffs would not go to trial, but with no more information than they are now offered they must come to trial unprepared.

*Colefax (Walter, K.C., with him)*, for the defendants. As regards samples the rule says nothing about them. The defendants have amply identified the particular users they intend to rely upon and have discharged all that they are called upon to discharge even under this extended rule. When the specification is looked at it will be found that the application for further particulars is not relevant to any issue in the action. The rule distinguishes between apparatus and process and contains much more stringent requirements in the former case. So far as it deals with apparatus it has no bearing on this case. Where the patent is for a process it is only necessary that the description given shall be sufficient to identify the alleged prior use.

*T. Terrell, K.C.*, in reply.

COZENS-HARDY M.R. These two appeals raise a question as to the construction and effect of r. 18 of Order LIII.A. We cannot impose upon a defendant in a patent action any greater liability than is justified by that rule, and it does not seem to me to be relevant to urge that something beyond and outside that rule will enable the plaintiff better to prepare for trial and will minimize expenses. Insufficient particulars are attended with most serious consequences, and it would be wrong for us to impose a needless burden upon the defendant. What is it that the rule requires? That question cannot be answered in a word. It depends upon the nature of the plaintiff's invention and it also depends upon the nature of the prior user alleged by the defendant. If the patent is one for machinery or apparatus great detail is required by the rule, the language of which I shall



call attention to in a minute. Drawings have to be furnished and experiments have to be permitted, always qualifying that statement by the fact that it must be within the power of the defendant to furnish the drawings and to allow the experiments. But when the patent is for a process and merely for a process no such detailed particulars are required. All that the rule exacts is a description sufficient to identify such alleged prior user. In the present case the plaintiffs allege that a patent, called Froment's patent, is one which the defendants are infringing. We are bound to see what it is that is claimed. It is clear that no machinery is claimed; no apparatus is claimed; it is simply and solely a patent for a process.

The first words of the specification are these: "This invention has reference to the concentration of metalliferous ores and earths for the purpose of separating and recovering therefrom the finely divided metal or metallic compounds and consists of a modification of what is known as the oil process of ore concentration." The claim is "The herein described process for the concentration of metalliferous ores and earths which consists in mixing the finely powdered ore or earth with water, adding a suitable oil, and then liberating a gas in the mixture substantially as described and for the purposes specified." There is no indication of any particular kind of oil. The patentee claims what in one part is called "a thin layer of ordinary oil" and in the claiming clause is described as "a suitable oil"; nor is there any statement of the kind of oil which is alleged by the patentee to be required in order to give effect to his invention.

The statement of claim having been framed in the usual form in a patent action, the defendants put in a defence by which they say that "the letters patent are invalid for the reasons in the particulars of objection herewith delivered appearing." When I look at the particulars the only clause to which I need refer is this: "The said alleged invention"—that is Froment's invention—"was not new at the date of the said letters patent but had been published in this country prior to such date." And then sub-section (d) is "by the public user by the Ore Concentration Syndicate Limited at their works at Glebe Road Kingsland Road in the county of Middlesex in the concentration of metalliferous ores by mixing

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the finely powdered earth with water, adding a suitable oil and liberating a gas, namely, carbonic acid in the mixture upon the several dates hereinafter mentioned." Then there are given in various columns the dates of the experiments, a description of the ores used by reference to the mines from which they come, a statement of the proportion of water to ore, and certain chemical particulars worked out to decimals. Then come these words: "The ore in each case contained a carbonate or carbonates and the water used was the ordinary tap water supply at the said works. The sulphuric acid by acting upon the carbonate or carbonates in the ore and the alkaline carbonates in the tap water liberated the carbonic acid."

The question which arises on both the appeals is whether that was a sufficient compliance with r. 18. I will read the material parts: "If one of the objections taken in the particulars of objections be want of novelty, the particulars must state the time and place of the previous publication or user alleged"—that has been done: there is no question about that—"and if it be alleged that the invention has been used prior to the date of the patent, must also specify the names of the persons or person who are alleged to have made such prior user"—that has been given—"and whether such prior user is alleged to have continued down to the date of the patent"—that is not alleged—"and if not, the earliest and latest dates on which such prior user is alleged to have taken place, and shall also contain a description (accompanied by drawings if necessary)"—we have not had any argument that drawings are necessary in this case—"sufficient to identify such alleged prior user." Then come some words dealing with machinery or apparatus which I pass over as having no relevance to the present case. Then it goes on to say, "No evidence at variance with any statement contained in the particulars shall be given in support of any objection," and then come further special provisions with reference to the case of machinery or apparatus only.

The points that now come before us are twofold. First of all there was an application by the plaintiffs for further and better particulars in one respect, and in one respect only. It was said that there ought to be more detailed particulars of the particular

ore which was used six or seven or more years ago from these mines; what was the quantity of carbonates in the particular specimens which were used. That came before Neville J. and he disallowed the application for further and better particulars, and from that order an appeal by the plaintiffs is made. A second summons was then taken out before Swinfen Eady J., who was then taking this class of work, and ultimately he made an order in these terms for the delivery of particulars: "(a) Of the kind of oil used on every one of the occasions in the said paragraph mentioned, (b) of the quantity of oil and percentage to ore so used, (c) of the nature of the apparatus so used." I should say that the plaintiffs also ask by their notice of appeal whether samples are in the defendants' possession and whether they will allow the plaintiffs to have inspection of such samples and to make tests therefrom.

I will at once deal with the apparatus. I can see no foundation whatever for any further particulars of the apparatus. The apparatus is not claimed by the patent. I think the patent relates to a process, and there is nothing either in the body of the specification or in the claim at the end which justifies us in exacting from the defendants any further particulars as to the nature of the apparatus used in working the particular process; nor do I think it is within our jurisdiction to require the defendants to say whether they have any samples of the ore so treated, or to require them to say whether they will allow the plaintiffs to have inspection of such samples and to make tests therefrom. Whether it might or might not be convenient that the rule should be so altered as to extend to a case like that I express no opinion, but I am clear there is nothing now which authorizes the Court to make any such order either as to the apparatus or as to samples and testing those samples. There remain substantially only two points: one, the ore and its analysis; the other, the kind and quantity of oil. In my opinion we ought not to make any order for further particulars on those matters. The defendants seem to me to have gone the full length which it is necessary for them to go. Their particulars do contain a description sufficient to identify such alleged prior user. They give a large number of chemical ingredients, and they give the time, place,

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persons, and the mines from which the ores came which were used on these particular occasions. It does seem to me that if we were to accede to the view of the plaintiffs in this action we should be imposing upon the defendants who are resisting this patent a burden which they are not bound to bear, and in my opinion, therefore, the appeal from Neville J. ought to be dismissed and the appeal from Swinfen Eady J. ought to be allowed, and the defendants will have the costs of both appeals.

FARWELL L.J. I agree with Neville J. and I am unable to agree with Swinfen Eady J. Mr. Terrell's argument really was that the Court should not consider the specification at all on applications of this sort, and, tempting though that may be, it seems to me quite untenable. The particulars required to be given by the rules must necessarily be relevant to the issue. The issue is one of anticipation—that is to say, the allegation that the invention has been used prior to the letters patent—but in order to determine that question one must ascertain what the invention is. It would be quite impossible for the Court to refrain from forming an opinion as to the meaning of the specification to the best of its ability upon the materials before it and without prejudice to any further decision which may be come to at the trial when all the usual array of experts would have instructed the Court more fully. No objection is raised as to the particulars as regards the acid or the water, but objections are raised, first as regards the oil, and secondly as regards the ore. If I followed Mr. Terrell rightly, his objection as regards the oil is that he does not know whether the patentee proposes to operate by way of surface tension or by way of flotation. It seems to me that that is absolutely immaterial for the reasons given by Fletcher Moulton L.J. in the Elmore case (*British Ore Concentration Syndicate, Ltd. v. Minerals Separation, Ltd.* (1)). The inventor patents a process and not a scientific explanation. In many cases he may not know the modus operandi of nature in bringing about the results he patents. If therefore the process described by Elmore causes the effect of surface tension or produces flotation, it is irrelevant

(1) (1909) 26 Rep. Pat. Cas. 124.



whether the patentee knew that it would or not. He says that he claims the application of oils to minerals in the mode stated, and whether the operation is due to the natural process which is called surface tension or to flotation is really immaterial. I have heard nothing else to shew that there is any necessity for giving further particulars about the oil. It appears to me, as at present advised, that the order made by Swinfen Eady J. as regards the oil is an order which simply imposes considerable trouble and expense on the defendants without being really relevant to any issue in the action. That disposes of the order, because I can find no ground for including the apparatus, nor indeed do I think that that was seriously pressed. It is impossible to say that because it is conceivable that the production of samples may save expense, therefore the Court is justified in treating samples as machinery or apparatus the inspection of which is, if possible, to be offered. Under the rules I do not think we are justified in adding those words to the rule so as to impose a greater burden on the defendants. I see nothing whatever to lead me to suppose that any of the things asked for are relevant to the issue of anticipation. I therefore agree with the order proposed.

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Solicitors: *Davidson & Morriss ; Hays, Schmettau & Dunn.*

H. B. H.

C. A. BURY v. FAMATINA DEVELOPMENT CORPORATION,  
 1909 LIMITED.  
April 5. [1909 B. 873.]

*Company—Income Bond—Construction—Bonus payable out of Profits—No Profits earned—Issue of paid-up Shares in exchange for Bonus—Dividends out of Capital—Issue of Shares at a Discount—Want of Consideration—Ultra vires.*

In October, 1904, a company raised 50,000*l.* by 5000 10*l.* income bonds, repayable in seven years with a bonus of 25*l.* exclusively out of the net profits from time to time of the company. By the conditions the registered holders of these bonds might exchange them for first mortgage debentures, but this was not to affect the bonus; by another condition the company had the option at any time after December, 1906, of giving notice to pay off the bonds, and six months afterwards the principal (if not converted) and the bonus were to become payable. In 1909, most of the bonds had been converted into debentures, leaving only the 25*l.* bonus payable; no profits had been earned, but it was proposed to extinguish this 25*l.* by the issue, in exchange for the bonus, of twenty fully paid up new shares of the nominal value of 1*l.* each. An action having been brought to test the validity of this proposed issue of further capital:—

*Held* (reversing the decision of Parker J.), that there was nothing in the bond which authorized the company to turn a contingent liability on income into a present liability payable out of capital; that the proposed arrangement with the bondholders was equivalent to a payment of dividends out of capital and provided a means of issuing shares at a discount, for there was no consideration given to the company for the issue of these new shares; and that on these grounds the arrangement was ultra vires the company and must be restrained.

APPEAL from a decision of Parker J.

This action was brought to test the validity of a proposed issue to the holders of certain income bonds, in exchange for their 25*l.* bonus payable exclusively out of profits, of fully paid up shares in the company to the nominal amount of 20*l.* The documents and facts so far as material were as follows:

In October, 1904, the Famatina Development Corporation, Limited, being in want of money, raised under the powers of their articles of association a sum of 50,000*l.* by means of 5000 income bonds for 10*l.* each. The price of issue was 10*l.*, and in

exchange for the cash each holder was to get his 10*l.* bond and a bonus of 25*l.* The bonds were as follows :

1. "The company will, when and as far as there are net profits of the company available for this purpose, pay to " (name) " who is the registered holder of one income bond numbered as above, or other the registered holder for the time being of each such bond of this series, the principal money of 10*l.* together with the sum of 25*l.* by way of bonus in respect of each such bond."

2. "The principal money and bonus payable upon the bonds of this series are payable exclusively out of the net profits from time to time of the company as provided by the conditions endorsed hereon, and so far as possible will be paid in equal instalments of 5*l.* per annum extending over seven years, subject to a conversion under clause 4."

3. "The registered holder for the time being of each bond shall have the option to take up at par ten shares in the capital of the company."

4. "The registered holder for the time being of any ten bonds of this series shall have the option of converting the principal money thereof into a first mortgage debenture of the company for 100*l.* as provided by the conditions endorsed hereon."

No. 1 of the conditions endorsed was—

1. "Subject to the under-mentioned terms of option to convert the principal money hereby secured into a first mortgage debenture of the company, the principal money and bonus payable on bonds of this issue shall be payable only out of the net profits available for the purpose from time to time made by the company, and subject to the rights of the holders of first mortgage debentures of the company, are to be a first charge on such profits of each year, until both principal money and bonus are paid and discharged."

No. 5 provided an option to the registered holder for the time being to exchange the bonds for 100*l.* first mortgage debentures, but this was not to affect the bonus secured by such bonds.

No. 13. "The company may at any time after 31st December, 1906, give notice to the registered holder hereof, his executors or administrators, of its intention to pay off the bonds in respect of

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which this warrant is issued, and upon the expiration of six calendar months from such notice being given the principal money, if not converted, and bonus hereby secured shall become payable."

All except a small number of these income bondholders had exchanged their bonds for debentures. No bonus had been paid, no profits having been made; it was, however, anticipated that profits would shortly be made, and the company were also desirous of making a further issue of capital, and under these circumstances it was considered advisable to get rid of these bonds, and it was now proposed to discharge the capital of those bonds that had not been converted by a cash payment, and to discharge the bonus of 25*l.* per bond, amounting to 125,000*l.*, by the issue and allotment of twenty new fully paid up shares of the nominal value of 1*l.* each. The plaintiff claimed an injunction to restrain this allotment, and the question was whether the resolutions by which this arrangement for the issue of 100,000*l.* in fully paid up shares in exchange for the bonus of 125,000*l.* was to be carried out were or were not ultra vires the company.

Parker J., being of opinion that under condition 13 the company had an option to convert what was a debt payable only out of future profits into a debt presently payable irrespective of the source from which it was paid and to pay it off, came to the conclusion that there was nothing ultra vires in the proposed transaction.

The plaintiff appealed.

*Martelli, K.C.*, and *Whitmore Richards*, for the appellant. The proposed arrangement is ultra vires the company. The assets of the company are not really increased by this issue; the company does not get 100,000*l.* in cash or in money's worth, and these 100,000 shares are in fact issued for no consideration at all; what consideration there is is a consideration not moving to the company, but to its members only. As things stand at present there is a charge on the future profits of the company which, until they are satisfied, will go to the holders of these bonds; after the proposed arrangement the profits, instead of going to the bondholders, will go as to a small portion to the



holders of the bonds, and as to the residue to the holders of the other shares in the company, and consequently the proposed arrangement would only effect a change in the distribution of the assets of the company. There is therefore no consideration given to the company; the consideration, if any, affects only the relation inter se of the members for the time being entitled to profits. It is said that this arrangement is not all one transaction and that this makes a difference: that makes no difference; it is the kind of transaction that was held invalid in *In re Railway Time Tables Publishing Co.* (1) The result of the transaction in that case and here is the same. If the transaction may enable shares to be issued at a discount it renders it ultra vires: *Mosely v. Koffyfontein Mines, Ltd.* (2) In the present case the proposed new shareholders will have paid nothing for their shares, which are to be allotted in payment of a bonus. Further, a profit liability cannot be discharged out of capital; a contingent liability on profits, if any are made, cannot be set off against a present liability on shares: *Habershon's Case*. (3) In the event of a winding-up these income bondholders could not have proved against the assets in competition with the other creditors of the company; there could therefore be no set-off. A company cannot give paid-up shares for nothing and preclude itself from requiring payment of them in money or money's worth: *In re Eddystone Marine Insurance Co.* (4); *In re Wragg, Ltd.* (5). At present there are no profits and therefore there is no fund available for payment; there is no enforceable claim against the company, and there can be no set-off: *Appleyard's Case*. (6)

*Romer, K.C.*, and *Ward Coldridge*, for the company. The company itself is under a liability to the holders of these bonds, and the release of that liability is a good consideration for any contract which the company may enter into with its bondholders for the discharge of this liability.

Under the terms of condition 13 the company, by serving a notice to pay off, can alter the original contract and make the

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(1) (1893) 68 L. T. 649.

(2) [1904] 2 Ch. 108.

(3) (1868) L. R. 5 Eq. 286.

(4) [1893] 3 Ch. 9.

(5) [1897] 1 Ch. 796, 829.

(6) (1880) 49 L. J. (Ch.) 290.

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principal and bonus immediately payable, and so convert this bonus into a debt, presently payable like any other ordinary debt, in discharge of which the company may apply its capital. The company think it would be an advantage to get rid of this debt now, and they propose to get rid of it on advantageous terms, by issuing 100,000*l.* in shares in exchange for this debt of 125,000*l.* on the bonus. A fixed charge on the profits affects the value of the assets almost as much as a fixed charge for the same amount on the corpus, and if this fixed charge is paid off the assets are increased. When a company or an individual enters into an agreement by which money is to be repaid by an allocation of profits, there is an implied condition, or covenant by the borrower, that the business shall in fact be carried on in such a way that profits can be earned: *Telegraph Despatch and Intelligence Co. v. McLean*. (1) As soon as this 50,000*l.* had been borrowed, whether charged on corpus or on profits, there was a liability on the company, and a liability which can be discharged out of capital.

A company can pay rent or interest on debentures out of capital; it may use its capital in the legitimate course of its business: *Trevor v. Whitworth* (2); and there is nothing in the Companies Acts which prevents its paying off or compounding a contingent liability, like this bonus, out of capital. If the company actually had the necessary cash at its bankers it could apply it in the discharge of this liability, and there is no difference between discharging it by means of a cash payment or by means of paid-up shares. There is nothing in the proposed arrangement that is equivalent to the issue of shares at a discount.

*Martelli, K.C.*, in reply. The company expect profits to be made shortly; it is desired to relieve these future profits by creating 100,000*l.* worth of extra capital. The result of this transaction will be that the shareholders, if there are profits, get a dividend out of and by means of the capital of the company; in other words, dividends will be paid out of capital, or it would be a return of capital to shareholders in the guise of dividends, which is ultra vires: *In re National Bank of Wales, Ltd.* (3)

(1) (1873) L. R. 8 Ch. 658.

(2) (1887) 12 App. Cas. 409.

(3) [1899] 2 Ch. 629.

COZENS-HARDY M.R. This appeal has been extremely well argued, and we have had all the advantage that we can possibly derive from counsel. Having heard the case fully, I have come to the conclusion that the decision of Parker J. cannot be maintained.

The case is a peculiar one so far as my experience goes, not so much from the class of question which comes before us, but from the form and the mode in which that question is raised. [Having stated the facts as to the issue of the 5000 income bonds, the form of the bonds and conditions indorsed, and having read condition 13 in full, his Lordship continued :—] We must now read condition 13 by striking out the words “the principal money, if not converted,” so that in substance the condition now is that the company may at any time after December 31, 1906, give notice, and upon the expiration of six months’ notice “the bonus hereby secured shall become payable.”

It has been argued that, although in the plain language of the early part of the bond, and of the first condition, the only obligation of the company was to pay out of profits, and to pay out of profits in five instalments, condition 13 not merely anticipated the date of payment, but altered the fund out of which it was payable and made it a debt like any ordinary debt in discharge of which the company might apply its capital. I am unable to accept that view. I think the only effect of condition 13 was to accelerate the time of payment out of profits; in other words, if the company in any year had profits of that year sufficient to pay the whole instalments, or such of the instalments as still remained payable, it might, out of the fund attributable to that purpose, give notice that it would at once pay off the bond; but I am unable to read that condition as having the effect which it is sought to make it have, namely, that of a clause enabling the company at its own will to change an income obligation into a capital obligation. Parker J. took a different view of the construction of condition 13, and I cannot help thinking, with the greatest possible respect, that that coloured his whole judgment.

I therefore proceed to deal with this case on the assumption that there is nothing in the bond itself which authorized the company to turn this contingent income debt into a present

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debt payable out of capital. That being so, what is sought to be done? The total amount of this bonus is 125,000*l.*: not a penny dividend has ever been paid by this company, but it is proposed to allot 100,000*l.* worth of new shares in the company as fully paid up in satisfaction of this 125,000*l.* bonus. The question really is, Is that a thing which it is competent for a limited company, tied and bound as it is by the Companies Acts, to do? In my opinion it is not, and, I think, for several reasons. First of all I will take the point which Mr. Martelli very forcibly put in his reply and indicated in his opening. What is desired is to relieve future profits of a burden; it is assumed and hoped that there will be future profits, say next year. The company want to relieve those future profits of the burden, and to do that at the expense of capital by creating 100,000*l.* worth of new share capital as fully paid up. What is the effect? The inevitable effect will be that the shareholders will next year, assuming a profit is made, get a dividend out of, and by means of, the capital of the company. It seems to me that really this arrangement sins against that perfectly well established doctrine that it is not competent for a company to pay dividends out of capital. In substance that is, beyond all doubt, what would be the result of this transaction. But apart from that—though that alone is enough to dispose of this case—is not this an issue of shares at a discount? Is not this an attempt to depart from that which the House of Lords in more than one case has laid down to be the true rule, that every creditor of a company has a right to assume that for the share capital which is issued as paid up the company has acquired either sovereigns to the nominal amount of this capital, or at least property which is fairly and reasonably and honestly treated as worth that amount? I cannot bring myself to think that it can be right to treat the extinguishment of this contingent future burden or charge upon the profits of a company as bringing in any asset to the company, or as doing anything more than relieving the shareholders, in the next few years it may be, of a burden in their own favour, or, in other words, I cannot see that there is any consideration moving to the company, which is the legal entity, something entirely



distinct from the persons who may happen to be the shareholders for the next year or two when profits are hoped to be made.

On these grounds, which I think are really borne out by the authorities with which we in this Court are now familiar, I think, with the greatest possible respect to Parker J., that the view which he took, coloured as it was by his construction of the 13th condition, cannot be supported, and that the injunction sought for by the applicant must be granted.

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FARWELL L.J. I am of the same opinion. There is a perfectly clear contract on the main bond that the company will, when and as far as there are net profits of the company available for the purpose, pay the principal money and bonus payable on the bonds exclusively out of the net profits from time to time of the company, and the second clause provides that they should pay in accordance with the conditions. Condition 13 merely adds a condition, not an abrogation of the main contract, but a condition which allows the company, if it thinks fit, and assuming that it has money arising from profits out of which to do it, to pay off, and to give notice to the registered holder to pay off, the bonds, and then the "bonus hereby secured shall become payable." "The bonus hereby secured" is that which is already mentioned in the actual bond itself, and is not altered in any way by the condition so annexed. I think, therefore, there is really nothing in that point, which, as I read the judgment of Parker J., was really the point on which he decided the case.

The other point is one of some little novelty, but I think it would be creating a dangerous precedent if it could possibly be maintained. In effect we are asked to grant an injunction to restrain the company from issuing shares for something which is practically of no value to the company at all. Now I apprehend that shares are issued subject to payment either in money or in money's worth, by which I understand that there must be something to set on the credit side of the company against the liability for the amount of shares issued. It may be cash; it may be property taken at a valuation in consideration of fully paid up shares issued. But here there is nothing. The contract by the company is that

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it will appropriate in futuro profits, if made, in discharge of certain indebtedness. That is not an asset of the company in any sense at all, nor does it properly appear in the capital account. There is nothing which can be set down as an asset which will answer the money supposed to have been borrowed upon it. This attempt so to discharge an income liability not in existence, but arising contingently in futuro, appears to me to be contrary to the very essence of the Companies Act. I think the analogy of individuals is very misleading. Here the company rests its position and status on certain terms: one of them is the memorandum of association stating its object. As Lord Watson says in *Trevor v. Whitworth* (1), "Paid up capital may be diminished or lost in the course of the company's trading; that is a result which no legislation can prevent; but persons who deal with, and give credit to a limited company, naturally rely upon the fact that the company is trading with a certain amount of capital already paid, as well as upon the responsibility of its members for the capital remaining at call; and they are entitled to assume that no part of the capital which has been paid into the coffers of the company has been subsequently paid out, except in the legitimate course of its business." That is to say that the company has an existence given to it by Parliament on which creditors are entitled to rely. One of those things is that it will carry on its business in its usual and legitimate way. Certainly it is not a usual and legitimate way of carrying on a mining business to dispose of contingent profit in futuro in a manner which will deplete capital. That, to my mind, is a fatal answer to this point, and I also think that Mr. Martelli's point about reducing the capital also applies.

On all these grounds, with respect to Parker J., I am unable to agree with his conclusion in the present case.

Solicitors: *Cox & Lafone; Allen, Edwards & Oldfield.*

(1) 12 App. Cas. 423.

## SIR W. C. LENG &amp; CO., LIMITED v. ANDREWS.

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*Restraint of Trade—Public Policy—Reasonable Protection of Covenantee—  
Newspaper Reporter—Unusual Stipulation—Infant.*

The defendant, while under age, entered the service of the plaintiffs, proprietors of a newspaper in a provincial town where a rival newspaper was established, as junior reporter under a written agreement which provided that he would not, after leaving the plaintiffs' service, "either on his own account or in partnership with any other person, be connected, as proprietor, employee, or otherwise, with any other newspaper business carried on" in the town or within a radius of twenty miles. There was evidence that such a clause was most unusual, almost unique, in agreements of this class. The defendant having entered the service of the rival newspaper:—

*Held* (reversing the decision of *Eve J.*), that the restriction was wider than was reasonably necessary for the protection of the plaintiffs' interest and therefore could not be enforced; that even had it been enforceable against an adult, it would not have been valid as against the defendant, who was an infant when he executed the agreement.

APPEAL from a decision of *Eve J.*

The action was brought for an injunction to restrain the defendant from being connected with any newspaper business carried on in Sheffield or within a radius of twenty miles from the town hall. The objects of the plaintiff company were, amongst other things, the carrying on in Sheffield and London and elsewhere the business of newspaper proprietors, and in particular the carrying on of the *Sheffield Daily Telegraph*. In July, 1905, the defendant, William Linton Andrews, then aged about nineteen years, entered the service of the plaintiff company as a junior reporter and signed an agreement with the company setting forth the terms of his service, whereby it was agreed (clause 8) that the defendant should not, after he should leave the plaintiffs' service, "either on his own account or in co-partnership with any other person, be connected, as proprietor, employee, or otherwise, with any other newspaper business carried on in Sheffield or within a radius of twenty miles from the town hall thereof." The defendant remained in the service of the plaintiff company until October, 1907, when he gave notice to the

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In March, 1908, the defendant entered the service of the Sheffield Independent Press, Limited, a company carrying on a newspaper business in Sheffield, as a reporter. The plaintiffs alleged that this was a breach of the agreement, from which they had suffered damage. The defendant contended that the agreement was unreasonable and an unnecessary restraint of the defendant's trade and therefore contrary to public policy and void; also that the defendant was an infant at the time of making the contract, and that the contract was not for his benefit and was therefore void. Evidence was given by the chief reporter of the plaintiffs' newspaper that from the position which the defendant occupied he would be able to give valuable information to the rival newspaper as to sources of exclusive information and other secrets of the plaintiffs' paper. On the other hand evidence was given by the editor of the *Daily News*, the editor of the *Daily Chronicle*, the news editor of the *Morning Post*, and others, that the clause was quite unusual and unique, and that it was a common thing for reporters to pass from one newspaper to another, even when the latter was a rival paper.

Eve J. came to the conclusion that the agreement was mentioned and explained to the defendant before he executed it, and that, though it was of an unusual character, it was not unreasonable under the circumstances; and holding, as he did, that it was not unreasonable in the case of an adult, he also came to the conclusion that, as the agreement was for the benefit of the defendant, it was nevertheless reasonable and binding, although the defendant was an infant at the time of its execution. His Lordship therefore granted the injunction as asked.

The defendant appealed.

Lord Robert Cecil, K.C., Buckmaster, K.C., and G. E. Leach, for the appellant. Restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case, and in every case the restriction imposed must be reasonable—reasonable in reference to the parties concerned and reasonable in reference to the



interests of the public : *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.* (1) The evidence shews that clause 8 of this agreement is most unusual, almost unique ; it is therefore more severe than is necessary for the protection of the plaintiffs' interests, and could not be enforced against an adult, much less against this defendant, who was an infant when he entered into this agreement. A contract with an infant would only be good if it was for his benefit : if the conditions are unusual and unreasonable the infant is not bound : *Leslie v. Fitzpatrick.* (2) There is no evidence of any such peculiar conditions in Sheffield as would make what is unfair and unusual in London fair and reasonable in Sheffield. There is also this very unusual clause, which was not the essential reason of the defendant obtaining employment for his benefit. Employment could have been obtained without the introduction of this clause.

*P. O. Lawrence, K.C.,* and *Harman,* for the respondents. Clause 8 was not unreasonable under the particular circumstances.

[COZENS-HARDY M.R. *Leslie v. Fitzpatrick* (2) says "unusual and unreasonable" in the case of an infant.]

On the whole it was for the benefit of the infant to accept employment on these terms. This is a local paper, and its advantage over any rival publication must depend very much on its sources of information ; it was therefore reasonable to provide that the defendant should not be allowed to carry any information obtained in the plaintiffs' office to any rival publication, and it was only on these terms that the defendant was engaged. Assuming this restriction to be good in the case of an adult, it would be good in the case of an infant if the contract was for his benefit.

The clause, though unusual, is not void as coming within the mischief of agreements in restraint of trade as originally laid down in *Mitchel v. Reynolds* (3) ; it is limited in space, and so does not interfere with the defendant earning his living as a reporter.

The Court must consider the nature of the particular business and whether the agreement is reasonably necessary for its

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(1) [1894] A. C. 535, 565.

(2) (1877) 3 Q. B. D. 229, 232.

(3) (1711) 1 P. Wms. 181.

C. A. protection ; the plaintiffs in their experience have found a clause  
1908 of this kind necessary, and Eve J. has found as a fact that it  
was reasonably necessary.

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[COZENS-HARDY M.R. The reasonableness is a question for the judge, not for a jury: *Dowden & Pook, Ltd. v. Pook*. (1)]

The clause is not void simply because its duration is not specified—*Haynes v. Doman* (2)—and it is not against public policy ; the onus is on the defendant to shew that this clause is unreasonable having regard to the plaintiffs' business. From the position the defendant occupied he would be able to give valuable information to a rival publication as to sources of exclusive information and the organization of the plaintiffs' paper, unless prevented by a clause of this kind.

The clause is severable, and the reasonable portion of it can be enforced for the protection of the covenantee: *Baines v. Geary*. (3) [*Clements v. London and North-Western Ry. Co.* (4), *Badische Anilin und Soda Fabrik v. Schott, Segner & Co.* (5), and *Underwood & Son v. Barker* (6) were also cited.]

COZENS-HARDY M.R. The question the Court has to decide is whether an agreement entered into by the defendant while an infant with the plaintiffs is valid in respect of clause 8, which is in these words : [His Lordship read it, and continued:—] It is for the Court to consider whether, on the ground of public policy, such a covenant is or is not reasonable, whether it is or is not valid ; and its validity depends upon whether it is more than is reasonably required for the protection of the covenantee. For the moment I am treating it as if the defendant was an adult. I shall have something to say hereafter as to his being an infant. I do not think that the law can be better stated than it was by Lord Lindley (then Master of the Rolls) in *Underwood & Son v. Barker* (6), where he says (7): "The modern doctrine, as I understand it, is that if an agreement restraining a person from carrying on business is injurious to the public interests of this

(1) [1904] 1 K. B. 45.

(2) [1899] 2 Ch. 13, 23.

(3) (1887) 35 Ch. D. 154.

(4) [1894] 2 Q. B. 482.

(5) [1892] 3 Ch. 447.

(6) [1899] 1 Ch. 300.

(7) *Ibid.* 304.

country such agreement is invalid to the extent to which it is injurious, but not further, if it is so framed as to permit of division into two portions, one of which is good and the other bad. See as to this *Baines v. Geary* (1) and *Nordenfelt's Case* (2), where the clause was severable, and *Perls v. Saalfeld* (3), where it was not. Further, it is now settled that, unless there are circumstances shewing some reasonable ground for imposing a restriction on a person's liberty to do what he can for his own support, that restriction will be held not binding upon him. According to this doctrine an agreement in restraint of trade which is wider than is reasonably necessary for the protection of the person seeking to enforce it is invalid so far as it is wider than is so necessary, and this may invalidate the whole restraint sought to be imposed if the clause imposing it is so framed as not to be severable."

Accepting that doctrine, we have to consider whether the restraint sought to be imposed by clause 8 is more than was reasonably required. Evidence was adduced in this case as to the nature of the business, as to the duties involved by the position which the defendant occupied, and as to what was or was not usual in contracts of this nature between persons in the relative positions of newspaper proprietor and reporter. The learned judge, who has heard all the evidence, has found as a fact—and the evidence seems to me to be conclusive on the point—that the restriction contained in clause 8 is unusual, and so unusual that, although many witnesses of great weight were called on the point, the plaintiffs did not give any instance of such a clause being imposed upon anybody else except persons in their own employ, with one eloquent exception. Their principal witness was recalled, and it appeared that he was some years ago on the *Western Morning News* at Plymouth, when they attempted to induce him to sign a contract containing a clause like the one in the present case, which he refused to do, and he continued in the same employment afterwards. Is not the fact that a clause like clause 8 is unusual, having regard to the fact of the frequency of these contracts between newspaper

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(2) [1894] A. C. 535, 565.

(3) [1892] 2 Ch. 149.

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proprietor and reporter, very strong to shew that it is unreasonable, in the sense in which the law uses the term? If it were reasonably necessary for the protection of a newspaper proprietor's business that a reporter should be subject to this restriction, it is to my mind inconceivable that it should not be usual to find such a covenant inserted; whereas in this case, on the finding of the learned judge, and in consequence of the really undisputed evidence, it must be taken that such a condition is unusual.

I will now take clause 8 itself and see what it does. The employee, who is a young man—I put aside his minority for the moment—binds himself during the rest of his life, after his engagement as a junior reporter is terminated by a month's notice on either side, that he will not during the whole of his life, “either on his own account or in copartnership with any other person or persons, be connected, as proprietor, employee, or otherwise, with any other newspaper business carried on in Sheffield or within a radius of twenty miles from the town hall thereof.” To my mind that is unreasonable and against public policy in a business of this nature and in an employment of this nature. A reporter does not stand in such a confidential relationship to the proprietor of a newspaper as to need or to justify that protection against disclosing any secrets which may perfectly reasonably be exacted from a commercial traveller or person who is familiar with the names of customers and who sees the books and knows the secrets of the business. I can see no such special circumstances in connection with Sheffield and the plaintiffs' newspaper as in any way justifies us in arriving at a different conclusion. We have heard that it is important for the paper that it should have sources of exclusive information. What is meant by that, except that the paper may have representatives in different parts of their district to furnish the proprietors with local news, I do not know, but that is not really the sort of confidential information which an employee cannot legally and properly disclose. Then we have heard the word “organization.” I fail to understand what that is. I have no doubt that the plaintiffs' newspaper is extremely well managed, that it has a good staff, and that everything is done in the most businesslike manner, but to say that that is knowledge which



will be of any value to the plaintiffs during all the life of the defendant is forcing on me a proposition which I feel it hopeless to accept. I cannot find that the learned judge has really found any facts which justify the conclusion that clause 8 is reasonably necessary for the protection of the plaintiffs' interests.

So much on the assumption that the defendant was an adult and entered into the contract with his eyes open. But we cannot forget that he was not an adult. He was an infant, and different considerations, it seems to me, may well apply. The defendant, being an infant, entered into a contract which was only good if it was for his benefit, and in considering whether it was for his benefit the onus is upon the plaintiffs to establish that the contract was for the benefit of the infant before they can sue upon it. The infant has not to establish that it was not for his benefit. What is involved in that proposition? I think that this much is involved—that it must be shewn that the contract which he entered into with the plaintiff company was not merely a contract under which he improved himself in his business, under which he got a salary which I assume to have been adequate and reasonable, but it must be shewn by the plaintiffs that it was a contract which contained clauses, and only clauses, that are usual and customary in an employment of this nature. I desire to adopt on this point the language of Lush J. in *Leslie v. Fitzpatrick* (1), where he says: "If such provisions were at the time common to labour contracts, or were in the then condition of trade such as the master was reasonably justified in imposing as a just measure of protection to himself, and if the wages were a fair compensation for the services of the youth, the contract is binding, inasmuch as it was beneficial to him by securing to him permanent employment, and the means of maintaining himself. If on the other hand advantage was taken of him to exact conditions which were unusual and unreasonable, or to secure his services for wages which were unreasonably low and inadequate, the infant is not bound." In my opinion clause 8 was, according to the evidence, unusual, and I think, even if it had been valid in the case of an adult, it would not have been valid in the case of the defendant, who was an infant. For these reasons, with

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C. A. great respect to Eve J., I cannot agree with his decision, and the  
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FLETCHER MOULTON L.J. I am of the same opinion. I take as an authoritative statement of the law the passage which has been read by the Master of the Rolls from Lindley M.R.'s judgment in *Underwood & Son v. Barker* (1), and I hold that the duty of the Court is, according to the lines there laid down, to decide whether clause 8 of the contract is against public policy. This is a matter of law which the Court has to decide, and not a matter of fact which at a trial with a jury would be left to the jury. But the Court has to instruct itself in the facts of the case; it has to know the position of the parties, the nature of the business, the nature of the employment, and the duties and the manner of carrying them out; and it is for that purpose that evidence is put before the Court. But I think it is also open to both parties to put before the Court evidence of what is customary in such employment, because if a thing is customary it is in favour of its being considered on the one hand as reasonably necessary and on the other hand as not unreasonably severe between the parties. If, however, it can be shewn that it is extremely unusual and almost unknown that certain restrictions should be imposed, it goes a long way to justify a Court in coming to the conclusion that the parties in the business, who must be supposed to know what is necessary for its successful carrying on, have come to the conclusion that it is not reasonably necessary for their protection. Now in the present case there is overwhelming evidence that a restriction such as that with which we have to deal is quite unusual in newspaper businesses as applied to employments such as that of the defendant. In fact, this seems to be almost an unique case, the only other case on which evidence was called being apparently a case in which the proprietors of a certain newspaper had attempted to introduce such a restriction and found it impossible to impose it upon their staff.

That being so, I turn to the facts of the employment. The

(1) [1899] 1 Ch. 300, 304.

defendant is a young man who is a reporter. He was beginning at the lowest stage of journalistic work, very likely with the intention of rising to higher steps on the ladder. He enters into this employment at a salary of 2*l.* per week, the employment being capable of being terminated by either party on a month's notice. His exact duties are those of junior reporter, and I confess that, after reading the evidence and thinking over it carefully, I cannot see that the position is one which would to any exceptional extent inform him of any secrets connected with the business. His duties would be those which naturally attach to reporting and, so far as I can judge, very little more. The restriction is that he shall for the whole of his life be prevented from being connected, either "as proprietor, employee, or otherwise, with any newspaper business carried on in Sheffield or within a radius of twenty miles from the town hall thereof." I ask myself, is it reasonably necessary that he should to that extent be prevented from using his powers of earning a living? In other words, does the business of his employers require that a protection so wide as that should be given to them, lest he should, after leaving their service, do them an injury? I confess I cannot bring myself to believe that any such wide protection is required; and I wish to say here that the fact that the restriction is not limited in point of time has had a very great effect upon my mind. I do not think that any of the previous decisions of the Court throw any doubt on the principle that the limitation with regard to time is a factor, and may be a most important factor, in deciding the question before the Court whether the restriction is reasonably necessary or not. Taking the totality of the restriction, I have no doubt that it is too wide, that it is wider than is necessary for the protection of the plaintiffs' business, and therefore that it is void as being against public policy. That being so, it is not necessary for me to enter into the question of infancy, and therefore I shall not deal with it.

FARWELL L.J. I agree. I start with the question of infancy for this reason—that in my opinion the fact that the defendant is an infant throws the onus of proving the reasonableness of

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the agreement on the plaintiffs, and it also deprives the plaintiffs of that argument to which I myself usually attach considerable importance, namely, that it does not lie in the mouth of an adult person in full possession of his faculties to deny his own agreement if it can be reasonably supported. Therefore I think it is important, in considering the reasonableness of a contract like this, to remember that a boy of nineteen or twenty is made to bind himself for the whole of his life. The onus is on the plaintiffs, and the question of reasonableness and public policy is a question of law for the judge: the evidence of the plaintiffs that they required the restrictions for their protection was no evidence at all on the point; so much so, indeed, that the question could not properly be put to them, because it is the very question that the judge had to determine: the admissible evidence is evidence of facts from which the judge could draw the conclusion whether the clause is reasonably necessary or not; evidence that the plaintiffs or any other persons think it reasonably necessary is not admissible. The learned judge says: "For reasons which I must assume the plaintiff company thought sufficient they desire and think it necessary for the protection of their business to prevent such matters as are likely to become known to their employees while in their service getting to the ears or becoming known to the proprietors of the other newspapers. Now, is that an unreasonable attitude to adopt? It has been said, and said quite fairly, by those who represent the defendant in this case that the plaintiffs have not indicated any particular matter which came to the knowledge of the defendant, the transfer of which or the transporting of which to the paper with which he is now engaged would necessarily be a breach of confidence on his part. In considering a matter of this sort one must have regard to the nature of the business which it is desired to protect"; and so on. In my opinion that is a misapprehension of the true functions of a judge in trying a case of this kind. It is for the plaintiffs to prove the sufficiency of their reasons, and that there were in fact weighty reasons; it is not enough for them to say that they think it reasonable and for the judge to say that it seems not unreasonable without any facts being proved to shew the reasonable necessity for the clause. The learned



judge goes on to say that there was "no particular matter which came to the knowledge of the defendant the transfer of which or the transporting of which to the paper with which he is now engaged would necessarily be a breach of confidence. There is no evidence at all to shew that there was any such thing." That is a finding of fact upon a material point, and one which, in my view, is really fatal to the plaintiffs' case. [Having referred to and criticized some other passages in the judgment of Eve J., his Lordship continued :—]

The result is that there is no fact found which shews any reason for requiring this restrictive agreement, and there is one fact found which goes far to shew that it is unreasonable, namely, that it is so unusual as to be unprecedented.

That is sufficient to dispose of the case, namely, that there is no evidence to support the conclusion of law. But, having regard to the course of the argument before us, I desire to read a passage from the speech of Lord Macnaghten in *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.* (1), where he says: "Restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable—reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public." The argument which has been addressed to us on behalf of the respondents does not bring the case within that doctrine. That doctrine does not mean that an employer can prevent his employee from using the skill and knowledge in his trade or profession which he has learnt in the course of his employment by means of directions or instructions from the employer. That information and that additional skill he is entitled to use for the benefit of himself and the benefit of the public who gain the advantage of his having had such admirable instruction. The case in which the Court interferes for the purpose of protection is where use is made, not of the skill which

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the man may have acquired, but of the secrets of the trade or profession which he had no right to reveal to any one else—matters which depend to some extent on good faith. A good deal has been said about organization. The evidence is singularly scanty in regard to details upon the exact meaning of that word in the present case; but I apprehend that a man who goes into an office is entitled to make use in any other office, whether his own or that of another employer, of the knowledge which he has acquired in the former of details of office organization, such as the establishment of one department with a chief or head and grades of subordinates under him, the desirability of establishing local centres of information in various towns and villages round about Sheffield, and the like. To acquire the knowledge of the reasonable mode of general organization and management of a business of this kind, and to make use of such knowledge, cannot be regarded as a breach of confidence in revealing anything acquired by reason of a person having been in any particular service, although the person may have learnt it in the course of being taught his trade; but it would be a breach of confidence to reveal trade secrets, such as prices, &c., or any secret process or things of a nature which the man was not entitled to reveal.

There is the further point that this restriction is entirely contrary to the interest of the general public, assuming it to be to their interest to be supplied with numerous newspapers from Sheffield or places within the twenty-mile radius. The owners of this particular paper desire to enforce the restriction over the entire radius of twenty miles. That may increase the circulation of their paper, but whether it is good for the public craving for news in that district is a different matter. In my opinion clause 8 is absolutely bad throughout, and no sound reason having been given for making it continue during the whole duration of the defendant's life, that alone, in my judgment, makes the restriction on the face of it unreasonable.

Solicitors: *Telfer Leviansky & Co., for Clegg & Sons, Sheffield; Sharpe, Pritchard & Co., for Bramley & Son, Sheffield.*

W. C. D.

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[1906 A. 869.]

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NEVILLE J.

July 27, 28.

*Prescription—Prescriptive Claim against Statutory Navigation Company—  
Prescriptive Claim to take Surplus Water only—User unlimited.*

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Nov. 24, 25.

The relators and plaintiffs, a statutory navigation company, claimed to restrain the defendants from taking water from a river forming part of their navigation. The defendants did not admit that the river was vested in the plaintiffs and claimed a prescriptive right to take from the river superfluous water not required for the purposes of the navigation. The user proved was that the defendants took as much water as they required without regard to the needs of the navigation :—

*Held* by Neville J., that the prescription must be limited and defined by the user, and the user being unlimited and not confined to water not needed for the discharge of the statutory duties of the plaintiff company, the prescription was for a right which the plaintiffs could not grant and which could not be obtained against them by prescription.

*Held* by the Court of Appeal, that the plaintiffs had not under their statutes any proprietary right in the water, and therefore the claim failed. The point decided by Neville J. doubted but not decided.

THIS action was brought by the Attorney-General against the Great Northern Railway Company on the relation of the Sheffield and South Yorkshire Navigation Company, who were co-plaintiffs, to restrain the railway company from taking water from the Cheswold, being part of the river Dun navigation, vested in the plaintiff company, for the purposes of their railway works at Doncaster and for the supply of locomotive engines belonging to themselves and other companies. The piece of water known as the Cheswold was a natural stream forming part of the river Dun navigation.

The navigation company had been incorporated by Act of Parliament in 1889 to take over from the Manchester, Sheffield, and Lincolnshire Railway Company (inter alia) the river Dun navigation. This navigation had been originally formed by an Act of Parliament of 12 Geo. 1, c. 38, when the Cutlers' Company of Hallamshire were the undertakers; it was afterwards transferred to the corporation of Doncaster. By an Act of 6 Geo. 2, c. 9, a company of the proprietors of the river Dun was

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formed, and by that and subsequent Acts the navigation was vested in that company and extended. This company constructed most of the locks, cuts, and dams by which the river Dun, including the Cheswold, was finally made navigable. The undertaking was afterwards transferred by Act of Parliament to two railway companies in succession, the last of which was in 1874 absorbed into and incorporated with the Manchester, Sheffield, and Lincolnshire Railway Company. These various Acts of Parliament created and preserved rights in the public to use the navigation and imposed on the successive undertakers the duty of maintaining the navigation and keeping a sufficient supply of water for that purpose.

The Great Northern Railway Company admitted that they had taken water from the Cheswold as riparian proprietors, and in excess of any right as riparian proprietors, for the purposes of their railway works and station and for the supply of locomotive engines of their own and belonging to other companies. They did not admit that the Cheswold was vested in or owned by the plaintiff company. They also claimed that they had acquired a prescriptive right to take such water, but admitted that the right acquired by them was and must be subject to the statutory obligation and duty imposed upon the navigation company by the Acts above referred to of preserving at all times an adequate supply of water for the said navigation and canal as prescribed by the said Acts, and was only exercisable to the extent of entitling them to take water so far as such water was not required to enable the navigation company to fulfil their statutory duties and obligations.

The amount of water taken on an average from 1881 to 1907 had never been less than 1,000,000 gallons a day, and during the latter part of the time considerably more. In 1907 the railway company had obtained a partial supply from another source, and the quantity taken was reduced to 600,000 or 700,000 gallons a day.

The evidence shewed that the water was pumped up by means of a pipe fixed considerably below the normal level of the Cheswold, and that the railway company took what they wanted without, so far as was proved, any reference to the requirements



of the navigation. The pumping engines were, as a rule, kept working night and day.

The action came on for hearing before Neville J. on July 27, 1908.

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*Montague Lush, K.C.*, and *C. F. Lowenthal*, for the plaintiffs.

The plaintiff company are a corporation created by statute with an obligation imposed upon them to maintain the supply of water for the navigation of the river Dun in the interests of the public. They have a property in the water, or at least a right to maintain an action for its abstraction. They could not make a grant in derogation of their statutory duties, and the Great Northern Railway Company could not acquire by prescription what the navigation company could not grant: *Rochdale Canal Co. v. King* (1); *Rochdale Canal Co. v. Radcliffe* (2); *Staffordshire and Worcestershire Canal Co. v. Birmingham Canal Navigations*. (3) The burden of proof of their prescriptive right is on the defendants.

*Sir Alfred Cripps, K.C.*, *Ernest Pollock, K.C.*, and *Howard Wright*, for the defendants.

[NEVILLE J. at the close of the evidence said: Your evidence does not go to your claim. I understand you only claim to prescribe for the surplus water not required for navigation, but there is no trace of any limit to your taking of water. The user must govern the prescriptive right acquired.]

The evidence shews that all the water the defendants took was surplus water, for, though many other people besides the defendants were taking quantities of water, the navigation was never really interfered with. Our prescriptive right to take waste water cannot be lost if we sometimes, without objection, took more than we had a strict right to take; nor if there were, say, 200,000,000 gallons surplus water, can we have lost our rights so long as we did not take more than that amount, because we took it in below the normal level of the canal.

In *Rochdale Canal Co. v. King* (1) and *Rochdale Canal Co. v. Radcliffe* (2) the defendants were millowners whose rights were

(1) (1849) 14 Q. B. 122.

(2) (1852) 18 Q. B. 287.

(3) (1866) L. R. 1 H. L. 254.

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defined by the canal company's Act, and the question was whether they had exceeded them. *Staffordshire and Worcester-shire Canal Co. v. Birmingham Canal Navigations* (1) was a dispute between two canal companies, both governed by Acts of Parliament, and it was claimed that the one had acquired by prescription a right to prevent the other performing their statutory duties.

In *Rochdale Canal Co. v. King* (2) at a later stage Kindersley V.-C. refused an injunction because the canal company had lost their rights by acquiescence. In *Medway Navigation Co. v. Earl Romney* (3) it was decided that a riparian proprietor could not take from the navigation surplus water without the consent of the company, but it shews that the Medway Navigation Company were in the habit of granting a right to take such water; and *Grand Junction Canal Co. v. Petty* (4) decided that a statutory company can dedicate a right of way if it is not inconsistent with their statutory duties. What a company can grant can be acquired by prescription against them. [They also referred to *Traill v. M'Allister*. (5)]

NEVILLE J. In this case the sole question I have to decide is whether the defendants, the Great Northern Railway Company, are entitled to continue the abstraction of the water from the Cheswold which the evidence shews has been taking place for a great number of years, certainly over twenty, and I think the real point that I have to consider is whether the navigation company would be acting within their powers in granting to any one the right to abstract water from this canal. It appears to me that having regard to their statutory obligations they would in making such a grant be acting ultra vires, and consequently I think that no prescription to a right equivalent to such a grant can be acquired against the proprietors of the navigation.

Now it is said, in fact it was conceded, that so far that must be so, but then it was said, although no one could obtain an absolute

(1) L. R. 1 H. L. 254.

(3) (1861) 9 C. B. (N.S.) 575.

(2) (1851) 2 Sim. (N.S.) 78.

(4) (1888) 21 Q. B. D. 273.

(5) (1890) 25 L. R. Ir. 524.

right to abstract water as against the navigation proprietors, they can acquire a right by grant, or by prescription, to abstract water so far as it is not required for the purposes of the navigation, inasmuch as if the right is limited in that way it could not interfere with the exercise by the proprietors of the navigation of their statutory obligations and rights. It seems to me that, whether or not such a right could be established against the proprietors of the navigation, the question is incapable of being raised in the present case, because I think that the prescription which it has been sought to prove is a prescription of a different kind—that is, a prescription unlimited by the requirements of the navigation proprietors, having no reference to the amount of water which they may require for the purposes of their boats. The prescription must depend upon, and is limited and defined by, the user that is proved. If the user that is proved amounts to a general abstraction without reference to the requirements of the proprietors of the navigation, in my opinion the defendants cannot improve their case by saying, “Although that has been the character of our user, that is not the nature of our claim, because what we claim to have a right to is to use only the surplus water of the canal, such waters as are not required for the purposes of the navigation.” When I look at the evidence I find that the railway company have for a period of over twenty years abstracted water from the canal by means of a pipe which has been laid considerably below the normal level of the canal, and that they have pumped night and day, taken the water as and when they required it, and there is no evidence before me at all of any limitation of this user dependent upon the amount of water in the canal or the requirements of the navigation.

Under those circumstances it seems to me that it is impossible for me to alter the nature of the user and to say that a prescriptive right has been made out which is not co-extensive with the user which has been proved. It seems to me that the right claimed must depend upon the user which has been established. I have no doubt that at times during these twenty years abstraction of the water has taken place when the water was so low that it could not in any sense be called surplus water. I

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think the inference from the evidence to that effect cannot be escaped. If I were to hold that any prescription was proved in the present case, it must, it seems to me, be a prescription to take such an amount of water as has been taken for the last twenty years, regardless of the question of whether there is or is not more than sufficient water in the top pond to satisfy the requirements of the proprietors of the navigation.

I think, therefore, that the defence to this action of the defendants fails, and that the plaintiffs are entitled to a declaration which may be in the terms asked for in the statement of claim, subject to this, that I have no means upon the evidence before me of ascertaining whether there has been any part of the user consistent with any rights which might exist in the railway company as riparian owners, and I have not been asked to consider, and I do not consider, the question of whether any rights as riparian owners remain, notwithstanding the statutes which have been passed under which the proprietors of the navigation act. I think, therefore, that I must grant a declaration, and, if asked for, an injunction, but that the judgment must be without prejudice to the rights of the defendant company, if any, as riparian owners, and I think that the defendants must pay the costs of the action.

The order made was—"The defendant company by their counsel admitting that they abstract water as hereinafter mentioned in excess of their rights (if any) as riparian owners, this Court doth declare that the defendant company are not entitled to abstract or take the waters so taken by them as aforesaid or any waters from the Dun navigation or any streams supplying the same or the Stainforth and Keadby canal other than waters so taken in exercise of their rights if any as riparian owners."

C. A.        The defendants appealed. The appeal came on for hearing on November 24, 1908.

*Sir Alfred Cripps, K.C., Ernest Pollock, K.C., and Howard Wright*, for the defendants, opened the appeal upon the grounds urged by them in the Court below. In the course of the opening Cozens-Hardy M.R. raised the question whether the plaintiff



company had any proprietary right in the water which would entitle them to an injunction. That point was then argued, but as it turned wholly on the construction of the numerous Acts of Parliament referred to above, it is not thought necessary to report the case on that point. The Court allowed the appeal and dismissed the action on the ground that the plaintiff company had no proprietary rights in the water and the defendants had not claimed any right to interfere with the navigation. The order was directed to be without prejudice to the rights of either party, if any, as riparian owners.

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The following judgments were delivered :—

COZENS-HARDY M.R. This is an appeal from a judgment of Neville J. [He then read the order made below.] The learned judge took the view that there was no prescriptive right which could be maintained by the Great Northern Railway Company upon the ground, apparently, that they had taken water for very many years without saying that they were only taking it as surplus water, that they might sometimes have taken it in excess of what was really surplus water, and that that rendered any defence of prescription impossible. If and when the question arises whether the defence of prescription in a case like this can be available—a case, I mean, in which there is a person who owns the water, or has the rights of a riparian owner lower down—I think that it will be a very grave matter for consideration whether the view taken by Neville J. is right or wrong. I do not propose to decide that now, for I am unable to bring myself to believe that the plaintiffs have any such right or title to the water as entitles them to say, as against the defendant company, “You have no right to take a pint of water except such as you can justify the taking of as riparian owners.” That seems to me a misconception of their position. The Great Northern Railway Company do not assert that they ever in any way claimed to take the water from this river or this canal to the prejudice of the navigation. Not only do they not assert that, but they assert the contrary, and are willing to give an express disclaimer.

That being so, it seems to me that the plaintiffs, who have brought this action on the footing, as I say, that they are

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entitled to prevent the railway company from taking a pint of water, are wrong, that the defendants' case does not rest upon prescription, but upon a different point altogether, and that the plaintiffs have not shewn any title to the water such as justifies the Court in making the declaration I have read or in granting the injunction which has been granted. I think the appeal must be allowed and the action dismissed, but without prejudice to any rights of either the plaintiffs or defendants as riparian owners.

FLETCHER MOULTON L.J. I am of the same opinion. In my view the plaintiffs brought the action under the impression that they were the proprietors of all the water flowing down the river Cheswold. The defendants seem to me to have taken up a right position. First of all they did not admit that the plaintiffs were the owners of that water, and secondly they said, "If you are the owners of the water your statutory obligations prevent you from parting with that which is necessary for the discharge of your duties, and we do not pretend to any right to take any water which would prevent the discharge of those duties. But we say that if you could part with the surplus water it is possible for you to lose your title to it and in that case we have acquired the right to take it by prescription." I do not propose to give any opinion upon that second defence. Like the Master of the Rolls, I am by no means satisfied that the view of the learned judge upon the point was correct. But the point does not seem to me to arise, because the first line of defence of the defendants, that there was not a proprietorship in the plaintiffs of the whole of the water in the Cheswold, appears to me adequately to dispose of the action.

We have been referred to the statutes by which the plaintiffs acquired their rights, which are entirely statutory, and it appears to me that there is no ground for saying that they are the owners of the whole of this water.

As this is so, and as the defendants, both by their defence and now before us, make it perfectly clear that they set up no claim to abstract water in such quantities as to prevent the plaintiffs from discharging their statutory obligations and duties

properly, it appears to me that the plaintiffs have failed entirely to make out their case, and that the action should be dismissed with costs.

FARWELL L.J. I agree. The plaintiffs may have some case as riparian proprietors, although that particular question was not gone into, apparently by arrangement between the parties in the Court below. According to the reservation of the Master of the Rolls in the order, that will be kept in mind.

This, therefore, remains simply as an action by the plaintiffs as having certain statutory rights and duties cast upon them. I think that it is plain that they have no property in this water. On their navigable river there is a right in the plaintiffs to take certain tolls under the statute, but to say that they can sell the water as proprietors seems to me to be quite out of the question. They have not any property in the water, and there can be no question of lost grant or prescription. The plaintiffs come here to enforce their statutory rights; but before action and by the defence the defendants disclaimed any intention to infringe those statutory rights. If the plaintiffs could have answered by saying "You take water and we want all the water—the whole of the water in the river is necessary for the due performance of our statutory rights," there would have been a question of fact to be determined, and no question of law; but that question of fact was for the plaintiffs to prove, and they have not proved it. The learned judge has made no such finding, and he has determined this case upon a question of law which, in my opinion, does not arise, and as to which I will reserve my own view until an occasion when it does arise.

Solicitors: *Johnson, Weatherall & Sturt, for Broomhead, Wightman & Moore, Sheffield; R. Hill Dawe.*

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April 7.*In re* EVANS.EVANS *v.* POWELL.

[1908 E. 816.]

*Will—Construction—Specific Devise—“House and effects known as Cross Villa”—Subsequent Alteration of Premises—Wills Act, 1837 (1 Vict. c. 26), s. 24—Contrary Intention.*

The testator by his will, dated in 1901, made the following devise to his wife for life, with remainder to his daughter: “House and effects known as Cross Villa situated in T.” At the date of his will he was possessed of half an acre of ground with a house upon it, the premises being known as “Cross Villa.” In 1906 upon a part of the ground, which he separated from the rest by a hedge, he erected two semi-detached dwelling-houses which he named Ashgrove Villas. He died in 1908. Upon a summons to determine the effect of the devise:—

*Held*, that it passed the whole of the property with all the buildings thereon.

## ADJOURNED SUMMONS.

Benjamin Evans by his will, dated April 2, 1901, made the following gift: “To my wife Agnes Evans I give and bequeath house and effects known as Cross Villa situated in Templeton in the county of Pembroke as long as she lives. After her days to my daughter Kezia Evans”; and he appointed his wife to be his executrix.

The testator died in 1908, leaving his widow, his daughter Kezia, now Mrs. Powell, and his only son, H. R. Evans, him surviving. At the date of his will he was possessed of a piece of ground about half an acre in extent, with a house upon it, in which he resided, the premises being known as “Cross Villa.” In 1906 upon part of this ground, which he separated from the rest by a privet hedge, he erected two semi-detached dwellings, which he named Ashgrove Villas, and into one of which he moved his residence. This was a summons taken out by the widow to determine, *inter alia*, what was the effect of the above-mentioned gift.

*W. H. Cozens-Hardy*, for the widow.

*Harman*, for the heir-at-law. Sect. 24 of the Wills Act provides that the will shall be construed with reference to the real



and personal estate comprised in it as if it had been executed immediately before the death of the testator, unless a contrary intention should appear. There is no such contrary intention here: *Castle v. Fox*. (1) The question is, What did "Cross Villa" mean at the date of the death? If the character of the property is entirely altered there is ademption: *In re Slater* (2); *In re Portal and Lamb* (3); *In re Gillins*. (4)

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*Younger, K.C.*, and *Dighton Pollock*, for *Kezia Powell*. The whole of the property in question passes under the gift. A mere change of name cannot affect the validity of the devise. "Cross Villa" is the specific designation of a particular subject of gift, and the question is what it means: *Goodlad v. Burnett* (5); *Theobald on Wills*, 7th ed. p. 130.

April 7. JOYCE J. The question to be determined in this case is as to the effect of a gift in the will of Benjamin Evans of the testator's "house and effects known as Cross Villa situated in Templeton in the county of Pembroke." When he made the will in 1901 he was seised of, or entitled to, a piece of ground about half an acre in extent, with a house upon it, where he resided, the premises being known as Cross Villa. In 1906 upon part of this ground, which he separated from the rest by a hedge of privet, he erected two semi-detached dwellings, which he named Ashgrove Villas, and he moved into one of these. He died in 1908. But for this alteration it is not disputed that the gift in the will would have passed the house Cross Villa with the half acre of ground. It is now contended, however, that, the portion of the ground separated by the privet hedge with the two new villas thereon having ceased to be known as Cross Villa, the gift in the will is avoided as to these, and that they pass to the heir-at-law as undisposed of by the will. No doubt s. 24 of the Wills Act provides "That every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a

(1) (1871) L. R. 11 Eq. 542.

(3) (1885) 30 Ch. D. 50.

(2) [1907] 1 Ch. 665.

(4) *Ante*, p. 345.

(5) (1855) 1 K. & J. 341.

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contrary intention shall appear by the will." But, as Lindley L.J. observed in *In re Portal and Lamb* (1), this section "does not say that we are to construe whatever a man says in his will as if it were made on the day of his death." The Court in construing a will must, in order to give effect to it, take into consideration the condition of things in reference to which it was made. For instance, if a testator makes a will devising his freehold house in Cavendish Square, and then sells it, purchasing another in the same square, the house subsequently purchased would not pass by the devise. Nor, if a testator devises his house in A. Street, would this devise be avoided by any change made during his lifetime in the name of the street. It is well settled that there may be such a specific description of the subject of a gift as to shew that what was intended to pass, whether real or personal estate, was some particular thing in existence at the date of the will. When, however, the description is generic, as "all my lands in the county of X.," the subject of the devise being capable of increase or diminution, all the testator's lands in the county of X. at the date of his death will pass; and where there is such a particularity in the description of the subject of a gift as to shew that it was some object in existence at the date of the will that was intended to pass, it is considered that there is sufficient evidence of a contrary intention to exclude the application of the provisions of s. 24.

In the present case the description of the house known as Cross Villa—the meaning of which, in my opinion, is the same as if the words had been "now known as Cross Villa"—is so particular and precise as to exclude the operation of s. 24 with respect thereto.

There is no question here, as there was in *Webb v. Byng* (2) or *Castle v. Fox* (3), whether under the description of the subject of the devise in the will something subsequently acquired could pass as additions; but any building erected, though subsequently, upon land devised by the will must pass by the devise of the land. The testator did nothing in reference to this property

(1) 30 Ch. D. 55.

(2) (1855) 1 K. & J. 580.

(3) L. R. 11 Eq. 542.

amounting to a revocation of the devise, and not having parted with any portion of the premises at the date of the will known as Cross Villa, I hold that the devise passes that property with all the buildings erected thereon, and that there is no intestacy.

Solicitors: *Waterhouse & Co., for D. Llewellyn, Bridgend; Crowders, Vizard & Co.*

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[1909 B. 486.]

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March 24.

*Will—Exoneration—Contrary or other Intention—Mortgage Debt on Whiteacre—Direction to pay out of Blackacre—Insufficiency of Blackacre—Locke King's Acts—Real Estate Charges Act, 1854 (17 & 18 Vict. c. 113), s. 1.*

A direction that a mortgage debt on Whiteacre shall be paid out of the proceeds of sale of Blackacre exonerates Whiteacre to the extent of those proceeds, but does not indicate a general "contrary or other intention" within the Real Estate Charges Act, 1854, s. 1, so as to enable the devisees of Whiteacre to come on the general personal estate for any deficiency.

*Allen v. Allen*, (1862) 30 Beav. 395, 403, explained.

ORIGINATING SUMMONS.

By his will dated July 1, 1907, a testator devised Whiteacre in severalty to specific devisees. After other specific devises not material hereto the testator declared that "any mortgage debts affecting the hereditaments hereinbefore devised shall be discharged and satisfied out of the proceeds of sale of"—Blackacre—"which I direct my trustees to sell for such purpose, the balance after payment off of such mortgages, costs and incidental expenses to fall into and form part of my residuary estate."

The testator devised and bequeathed his residuary real and personal estate to his trustees upon trust for sale and conversion and out of the proceeds to pay his funeral and testamentary expenses and debts, and to stand possessed of the residuary trust moneys in trust for certain residuary legatees.

The testator died on October 21, 1907.

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At the time of his will and his death he was seised in fee of Whiteacre, Blackacre, and the other lands specifically devised.

Whiteacre was subject to a mortgage of 500*l.* created by the testator and containing the usual covenant to pay, and there were no other mortgages.

The residuary personal estate less debts was 140*l.*, and there was no residuary real estate.

Blackacre realized only 285*l.* net, leaving a deficiency of 215*l.* on the Whiteacre mortgage.

The question was whether the devisees of Whiteacre could have this deficiency satisfied out of the residuary personal estate, or whether it must be borne by Whiteacre.

This summons was issued to determine the point.

*Charles Stimson*, for the executors and trustees.

*J. M. Gover*, for the devisees of Whiteacre. The testator directed the Whiteacre mortgage to be paid out of the proceeds of sale of Blackacre, and the balance of those proceeds to fall into residue. He evidently contemplated that those proceeds would be sufficient. He has thereby expressed an intention that Whiteacre shall not bear any part of the mortgage, and has excluded the operation of Locke King's Acts not only to the extent of Blackacre, but also to the extent of all his assets that under the old law would have been applicable to payment of debts before Blackacre was resorted to, namely, the general personal estate: *Allen v. Allen* (1); *Theobald on Wills*, 7th ed. p. 180. It is suggested in *Jarman on Wills*, 5th ed. p. 1458, that *Rodhouse v. Mold* (2), in which *Allen v. Allen* (1) was not cited, is contrary to this view. But in *Rodhouse v. Mold* (2) the debts were only expressly charged on the personalty, i.e., the primary fund, so that Locke King's Acts were only excluded to the extent of that fund, and the devisees of the mortgaged estate could not be exonerated out of the subordinate funds, such as the residuary real estate.

*De Montmorency*, for the residuary legatees. Whiteacre is only exonerated to the extent of the proceeds of Blackacre: *Rodhouse v. Mold* (2); *Jarman on Wills*, 5th ed. p. 1458. This

(1) 30 Beav. 395, 403.

(2) (1865) 13 W. R. 854.



would have been so even under the old law, as the testator has expressly provided that the mortgage was to be paid out of the proceeds of Blackacre, and the balance carried to residue. This would have been a sufficient intention to exonerate the personalty from the mortgage debt.

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SWINFEN EADY J. (after stating the facts). The testator contemplated that the proceeds of sale of Blackacre would be more than sufficient to pay the mortgage, because he directed the balance after payment to fall into residue. When therefore he directed his debts to be paid out of the proceeds of sale of his residuary real and personal estate he was not referring to mortgage debts, which were previously provided for, but to debts other than mortgage debts. As a matter of construction the testator has shewn an intention to exonerate Whiteacre to the extent of the proceeds of sale of Blackacre and no further. There is nothing in the will from beginning to end to point to any further exoneration. The devisees of Whiteacre contend that, when once the intention to exonerate them in whole or in part is found, the matter must be treated as if Locke King's Acts were non-existent, and the old law, under which the devisees of mortgaged estates were entitled to exoneration out of the personal estate, must be applied.

Now Locke King's Act, 1854, provides that when any person shall die seised of any estate in any land which shall at the time of his death be charged with the payment of any sum of money by way of mortgage, and such person shall not, by his will or deed or other document, have signified "any contrary or other intention," the heir or devisee to whom such land shall descend or be devised shall not be entitled to have the mortgage debt discharged or satisfied out of the personal estate or any other real estate of such person, but the land so charged shall, as between the different persons claiming through or under the deceased person, be primarily liable to the payment of all mortgage debts with which the same shall be charged.

The true construction of that section is that the devisee of land so charged takes the land subject to the payment of the mortgage debt except so far as a contrary or other intention is

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shewn, and it is only so far as a contrary or other intention is shewn that the land is to be exonerated. This alters the previous law under which the devisee of mortgaged land was entitled to have the mortgage discharged out of the first four classes of assets, and renders the mortgaged estate itself *prima facie* liable.

*Allen v. Allen* (1) was relied on in support of the view that, if any contrary intention whatever is shewn by the provision or substitution of any fund for payment of the mortgage, Locke King's Act is altogether ousted and the devisee can claim exoneration out of the other assets in their proper order. On the other hand, *Rodhouse v. Mold* (2) was relied on in support of the contrary view.

The point is discussed in Jarman on Wills, 5th ed. p. 1458, as follows: "Where the contrary intention is shewn by the substitution of another fund, the question arises, is the Act ousted altogether, so that exoneration may be claimed generally out of the other assets in the order appointed by the old law; or is the Act excluded only to the extent of the substituted fund, so that if this proves insufficient the right to exoneration is exhausted and the burden comes back at once to the mortgaged land? In *Allen v. Allen* (1) Sir J. Romilly, without deciding the question, took pains to shew that his opinion was in favour of the former view. But in *Rodhouse v. Mold* (2) Sir R. Kindersley decided that the latter was the correct view; and, having regard to the course taken by the recent decisions on the Acts, this view seems likely to prevail; for if there was once a desire to give as little effect to them as possible, those decisions shew that the desire has now been removed, if not reversed."

I am not satisfied that Romilly M.R. meant to express any opinion in favour of the devisee's right to general exoneration in such a case; but I adopt the opinion of Sir R. Kindersley, which appears to me to be the true view, namely, to give effect to the contrary intention so far as shewn by the will and no further. In the present case the only intention is to exonerate Whiteacre to the extent of the proceeds of Blackacre, and I can find no indication of any intention that Whiteacre is to be exonerated also out of the general personal estate.

(1) 30 Beav. 395, 403.

(2) 13 W. R. 854.

I therefore hold that the devisees of Whiteacre are not entitled to exoneration out of the general personal estate.

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Solicitors: *Walter Henry Court, for Albin Hunt & Fourmy, Chesham; Ridsdale & Son, for Francis & How, Chesham.*

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[1909 B. 294.]

*March* 10, 25.

*Will—Mixed Fund—Implied Charge of Legacies—Express Charge of Debts—Period of Limitation—Limitation Act, 1623 (21 Jac. 1, c. 16), s. 3—Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 8—Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 2, sub-s. 3.*

A testator devised and bequeathed “all the real and personal estate to which at my death I shall be entitled” to his trustees upon trust for sale and conversion and out of the proceeds to pay “my debts and funeral and testamentary expenses” and to hold the residue thereof in trust for certain residuary legatees. He then bequeathed certain pecuniary legacies.

The testator died in 1901. His only asset was a reversionary share of real estate which fell into possession in 1905 and was sold in 1908.

The legacies and certain simple contract debts incurred more than six but less than twelve years ago being still unpaid:—

*Held*, that notwithstanding the Land Transfer Act, 1897, s. 2, sub-s. 3, the charge of debts on the real estate was not nugatory, but had the effect of bringing the debts within the Real Property Limitation Act, 1874, s. 8, so that as against the real estate the period of limitation was twelve years, and they were still recoverable.

*In re Stephens*, (1889) 43 Ch. D. 39, and *In re Kempster*, [1906] 1 Ch. 446, 449, applied.

*Held*, also, that notwithstanding the absence of the words “rest and residue” the general devise and bequest of the real and personal estate as a mixed fund in one mass was clearly residuary, so that the legacies were charged upon and payable out of the real estate.

*Greville v. Browne*, (1859) 7 H. L. C. 689; *Elliott v. Dearsley*, (1880) 16 Ch. D. 322; and *In re Grainger*, [1900] 2 Ch. 756, 767; [1902] A. C. 1, applied.

ORIGINATING SUMMONS.

By his will dated March 20, 1897, a testator, after appointing the two plaintiffs his executors and trustees, devised and bequeathed “all the real and personal estate to which at my

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death I shall be entitled" to his trustees upon trust for sale and conversion and out of the proceeds to pay "my debts and funeral and testamentary expenses" and to hold the residue thereof in trust for certain residuary legatees. The testator then bequeathed a legacy of one hundred guineas to each of his executors who should prove and act in the trusts of his will.

The testator died on April 30, 1901. His only property consisted of a reversionary share of real estate which fell into possession at his mother's death on July 9, 1905.

On October 13, 1905, the will was proved by both executors, and on October 20, 1905, they advertised for creditors. The real estate was then sold in a partition action, and in December, 1908, the executors received 423*l.* as their testator's share, out of which they repaid 32*l.* that had been advanced for funeral expenses, leaving a balance of 391*l.* in their hands.

The only creditors were two of the residuary legatees, who, as representatives of the testator's mother, claimed 296*l.* for payments made on behalf of the testator or his estate from 1899 to shortly after his death, i.e., more than six but less than twelve years ago.

The executors admitted that the claim was correct to the extent of 60*l.*, but submitted that the trust to pay debts out of the real estate was rendered nugatory by the Land Transfer Act, 1897, and that the whole claim was barred by the Limitation Act, 1623. A further question was whether their legacies were payable out of the real estate.

This summons was issued to determine these and other points.

*Brodie Cooper*, for the executors. A trust for payment of debts out of personalty is nugatory, as the executors necessarily take personalty subject to payment of debts: *Scott v. Jones*. (1) Since the Land Transfer Act, 1897, they take both real and personal estate subject to payment of debts. The real estate vests in them under s. 1, sub-s. 1, as if it were a chattel real, and s. 2, sub-s. 3, provides that the "real estate shall be administered in the same manner, subject to the same liabilities for debt,



costs, and expenses, and with the same incidents, as if it were personal estate; provided that nothing herein contained shall alter or affect the order in which real and personal assets respectively are now applicable in or towards the payment of funeral and testamentary expenses, debts, or legacies, or the liability of real estate to be charged with the payment of legacies." At the present day, therefore, a trust for payment of debts out of realty or a mixed fund is equally nugatory. The debts were therefore barred after six years under the Limitation Act, 1623. The legacies are by implication charged on the mixed fund of realty and personalty—*Elliott v. Dearsley* (1)—and are payable out of the realty, which is the only asset.

*H. M. Humphry*, for the residuary legatees, including the two creditors. A trust to pay debts out of realty is not necessary, but it is not futile or nugatory: *In re Kempster*. (2) The debts are expressly charged on the realty, and the period of limitation as against the realty is twelve years: Real Property Limitation Act, 1874, s. 8. The debts are therefore still payable. The legacies are not charged on the realty, and there is no fund to pay them. In *Elliott v. Dearsley* (1) the testator gave "the rest and residue" of his real and personal estate to trustees upon trust for sale and conversion. He subsequently gave pecuniary legacies. Fry J. held that the "rest and residue" meant whatever remained after giving effect to the previous and subsequent gifts, and on appeal James L.J. said, "The legacies are no doubt charged on the real estate by force of the word 'residue.'" These observations were approved by Rigby L.J. in *In re Grainger* (3), and his judgment was adopted in the House of Lords. In the present case there is nothing to make the devise of the real estate residuary or to shew any intention to charge the legacies thereon.

*Brodie Cooper*, in reply.

*Cur. adv. vult.*

March 25. SWINFEN EADY J. The first question is whether the devise by the testator of his real estate to trustees upon trust for

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(1) 16 Ch. D. 322, 326, 329.

(2) [1906] 1 Ch. 446, 449.

(3) [1900] 2 Ch. 756, 767; [1902]

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sale, and out of the proceeds to pay his debts, has the effect of preventing those debts from being barred until the expiration of twelve years under the Real Property Limitation Act, 1874, as would have been the case before the Land Transfer Act, 1897—see *In re Stephens* (1)—or whether the debts are now barred after six years by the Limitation Act, 1623.

It is contended that as the real estate now passes to the executor, who is entitled and bound to resort to it, if necessary, for the payment of debts, it is in the same position as personal estate.

A trust of personal estate for payment of debts, or a charge of debts on personal estate, does not prevent the operation of the Limitation Act, 1623.

In *Scott v. Jones* (2) it was decided that, as the executors took the personal estate subject to the claim of the creditors, the position was not affected or altered by the testator himself declaring in express terms that the personal estate should be subject to the payment of his debts. The contention is that this reasoning is now applicable to real estate by virtue of the Land Transfer Act, 1897, s. 2, sub-s. 3, and that the trust for payment of debts contained in the will is nugatory and futile. I am of opinion that this contention is not well founded.

The Land Transfer Act, 1897, s. 2, sub-s. 3, contains the following proviso: “provided that nothing herein contained shall alter or affect the order in which real and personal assets respectively are now applicable in or towards the payment of funeral and testamentary expenses, debts, or legacies.”

If real estate be expressly devised in trust to pay debts, that real estate forms the assets next applicable, after the general personal estate is exhausted: *Powis v. Corbet* (3); *Phillips v. Parry*. (4)

Again, if real estate be charged with debts, the effect of the charge is to render the land charged applicable as assets next after real estate descended to the heir, and in priority to all real estate comprised in a specific or residuary devise, and not charged with debts. It is quite inaccurate to say that such a trust or charge as before mentioned is nugatory.

(1) 43 Ch. D. 39.

(2) 4 Cl. & F. 382.

(3) (1747) 3 Atk. 556.

(4) (1856) 22 Beav. 279.

In the recent case of *In re Kempster* (1) Kekewich J. pointed out that since the Land Transfer Act an express charge of debts is not futile, and that it is erroneous to say that no effect will be given to it. Although an executor is now entitled by law in every case to resort to the real estate for payment of debts, and is bound so to do if the circumstances require it, yet effect must still be given to a trust of land to pay debts, or a charge of debts upon land; the debts thereby become "charged upon or payable out of any land" within the meaning of s. 8 of the Real Property Limitation Act, 1874, and the period for their recovery is twelve years after a present right to receive the same shall have accrued. None of the statutes which by slow and hesitating steps have made land available for the debts of a deceased person have purported to interfere with any testamentary dispositions providing either by way of trust or charge for the payment of debts. [After dealing with a point raised in the correspondence, his Lordship continued:—]

The executors' legacies are also payable out of the mixed fund representing the proceeds of real and personal estate. It is established that the rule of *Greville v. Browne* (2) applies so as to render legacies payable out of a mixed fund, whether the legacies are given before or after the gift of residue: see *Elliott v. Dearsley* (3); *In re Grainger*. (4) It was sought to distinguish the present case, as the words "rest and residue" do not occur; but when the testator bequeaths pecuniary legacies and also gives all the real and personal estate to which at his death he shall be entitled in one mass, he obviously means his residue.

The result is that the legacies are payable out of the mixed fund.

Solicitors: *W. H. Hales; Fairfoot, Rooke & Macdonald.*

(1) [1906] 1 Ch. 446, 449.

(2) 7 H. L. C. 689.

(3) 16 Ch. D. 322, 329.

(4) [1900] 2 Ch. 756, 767; [1902] A. C. 1.

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*Followed. Re WOHLGEMUTH. [1949] 1 Ch. 12*

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March 26.

*Applied. Re WOHLGEMUTH'S WILL TRUSTS. [1948] 2 All E.R. 882.**In re EVE.*

EDWARDS v. BURNS.

[1909 E. 180.]

*Will—Illegitimate Children—Class Gift—Mother past Child-bearing—Construction of Will.*

E., by her will dated in 1907, gave her residuary estate to trustees "In trust for and to be equally divided between and among the children of my sisters Mary Ann Burns, Clara Davenport and Sarah Pugh, and of my brother William Sales and the issue of such of them as shall die in my lifetime leaving issue, such issue taking his her or their parents' share." Mary Ann Burns was at the date of the will a widow nearly sixty-eight years of age; she had been married in 1869, having had two children by her husband before marriage and had no other children. She was living with E. at the date of her will and her death. E. knew all the facts, and was on affectionate terms with the children. The other sisters and the brother all had legitimate children living:—

*Held*, that M. A. Burns' two illegitimate children took shares on the ground that there were not, and never could be, any legitimate children to answer the description.

PRISCILLA EVE, widow, by her will dated February 8, 1907, gave all her residuary real and personal estate to trustees, upon trust for sale, conversion, and investment, and, after payment of debts, funeral and testamentary expenses and legacies, to stand possessed of the proceeds and the investments for the time being representing the same "In trust for and to be equally divided between and among the children of my said sisters Mary Ann Burns, Clara Davenport and Sarah Pugh and of my said brother William Sales and the issue of such of them as shall die in my lifetime leaving issue such issue taking his her or their parents' share."

By a codicil dated June 15, 1907, she revoked certain specific bequests made by the will, made certain other specific bequests, and in all other respects confirmed her will.

The testatrix died on May 9, 1908.

The testatrix's sister, Mary Ann Burns, was born in March, 1839, and was within a month of sixty-eight years of age at the date of the will. She had been married in 1869 to Arthur Burns,



but had had two children by him before her marriage, a son born in 1861 and a daughter born in 1863. She never had any other children. She constantly visited the testatrix, and about twelve months before the testatrix's death came to reside with her permanently and continued to do so till her death. The testatrix knew perfectly well the facts as to the children's birth, and they visited her and were on affectionate terms. She always spoke of them as her niece and nephew, and introduced the daughter to others as her niece. The children had been registered as children of Mary Ann Burns, formerly Sales, and Arthur Burns, and in one case the register was attested by the father.

This summons was taken out by the trustees of the will to determine the question whether the two children of Mary Ann Burns were entitled to shares of the residue.

The testatrix's other sisters and her brother all had legitimate children who were living at her death.

*A. de W. Mulligan*, for the trustees.

*J. M. Stone*, for the children of M. A. Burns. It is abundantly clear from the evidence that the testatrix meant the two children of Mrs. Burns to take. The only question is whether there is enough in the will and the surrounding circumstances, which the Court is not only entitled, but bound, to look at, to enable the Court to give effect to her intention. In *Hill v. Crook* (1) Lord Cairns defines two classes of cases in which the rule that "children" means legitimate children will be departed from. The first is where it is impossible that there should be any legitimate children. That is the case here. It was impossible, considering Mrs. Burns' age, that there should be any legitimate children. The other class of cases is quite distinct, where the Court finds something on the face of the will indicating the illegitimate children. In that class of cases it has been held that "the children," in circumstances similar to those here, must mean the existing children: *In re Haseldine*. (2) In *In re Brown* (3) it appeared that the lady was sixty, and North J. said there was no evidence that the testatrix knew her age; apparently he would

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(1) (1873) L. R. 6 H. L. 265, 282.

(2) (1886) 31 Ch. D. 511.

(3) (1890) 63 L. T. 159.

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have taken it into consideration had the testatrix known it. *In re Du Bochet* (1) is an authority that in a class gift to the children of a nephew and two nieces the illegitimate children of one may take though there are legitimate children of the others.

*T. K. Crossfield*, for the children of Clara Davenport, Sarah Pugh, and William Sales. The word "children" in a will means *prima facie* legitimate children, and it cannot include illegitimate children unless a plain intention can be found on the face of the will itself: *Dorin v. Dorin*. (2) In *Hill v. Crook* (3) Lord Cairns found such an intention in the testator's speaking of a man to whom he knew his daughter was not legally married as his "son-in-law." There is no such indication here, for the testatrix's sister was correctly described as Mary Ann Burns. It is not the fact that the gift in this case would fail if the illegitimate children do not take. The gift is to a class made up of the children of three sisters and a brother. That gift does not fail because one sister has no children. To hold that the illegitimate children must take is to let legitimate and illegitimate children take together in one class, which is impossible.

The Court will never consider whether a woman is past child-bearing in a question of the construction of a will: *In re Hocking* (4); *In re Browne*. (5) The case of *In re Brown* (6) lays down no principle, and is an example of the danger of discussing whether there was an impossibility of children being born and whether the testatrix knew of it. In *In re Loveland* (7) there was a clear indication on the face of the will that the testator meant illegitimate children to take. In *In re Du Bochet* (1) I submit that Joyce J. went too far, in that he admitted illegitimate children under a class gift when there were legitimate children to take, and that he decided on a "strong probability," deduced not from the will itself, but from external facts. The Court cannot act on external facts alone. As Bowen L.J. says in *In re Haseldine* (8), "The external facts could not have controlled the plain words."

(1) [1901] 2 Ch. 441.

(2) (1875) L. R. 7 H. L. 568.

(3) L. R. 6 H. L. 265, 285.

(4) [1898] 2 Ch. 567.

(5) (1889) 61 L. T. 463.

(6) 63 L. T. 159.

(7) [1906] 1 Ch. 542.

(8) 31 Ch. D. 511, 519.

SWINFEN EADY J. The question is who, under the circumstances of this case, are entitled to share in the residuary gift in the testatrix's will, which is in these terms. [His Lordship read the gift.] The will was made in February, 1907, and confirmed by a codicil in June, 1907. The testatrix died on May 9, 1908. Her sister Mary Ann Burns was at the date of the will within a month of the age of sixty-eight years. The testatrix was the elder sister, and was about seventy. Mary Ann Burns had had two children only, who are made defendants to this summons. They were both born before her marriage, the one in 1861 and the other in 1863. The marriage took place in 1869, and Mary Ann Burns had been left a widow before the date of the will. The two children, though born before the marriage, were registered as the legitimate children of Mary Ann Burns, formerly Sales, and Arthur Burns, who was afterwards her husband, and in one case the register is attested by the father. The testatrix knew all the facts about the birth of these children, and that they were the only two children her sister had. The children were on friendly terms with the testatrix, and the evidence shews that she and the rest of the family treated them as legitimate.

With regard to the testatrix's other sisters and brother, Clara Davenport had three children, Sarah Pugh had eight, and William Sales had four, all living at the testatrix's death and defendants to the summons.

Some twelve months before the testatrix's death Mary Ann Burns had come to reside permanently with her, and continued to do so till her death. One of the two children in question, the daughter, appears to have been suffering from cancer and to have undergone an operation at the hospital, under the advice of the testatrix's own doctor, and the testatrix took much interest in her recovery and welfare.

It is under these circumstances that I approach the will to discover what is its true construction. I propose merely to state the law as laid down by the highest authority and apply it to this case. The term "children" in a will *prima facie* means legitimate children, and if there is nothing else, the circumstance that the person whose children are referred to has illegitimate children will not entitle those illegitimate children to take.

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Then Lord Cairns said in *Hill v. Crook* (1): "But there are two classes of cases in which that prima facie interpretation is departed from. One class of cases is where it is impossible from the circumstances of the parties that any legitimate children could take under the bequest. A familiar example of that might be given in this way:—Suppose there is a bequest 'to the children of my daughter Jane,' Jane being dead, and having left illegitimate children, but having left no legitimate children. There, inasmuch as the testator must be taken to have known the state of his family, and must be taken to have intended to benefit some children of his daughter Jane, and inasmuch as she had no children who could be benefited except illegitimate children, rather than that the bequest should fail altogether the Courts will hold that those illegitimate children are intended, and they will take under the term 'children.'"

Applying that statement of the law to this case, I have to ask myself who could the testatrix have meant when she made this gift to the children of Mary Ann Burns, the old widowed sister who was then living with her. There were two illegitimate children whom she knew all about, and there never could be any other or legitimate children who could take under this bequest. Lord Cairns said that one class of cases in which illegitimate children may take is, where there is a gift to children and it is impossible that legitimate children should take. That is this case. In the circumstances which existed at the date of the will it was impossible that any legitimate children should take. There were none and never could be any. It is impossible to come to any other conclusion than that the testatrix intended these two children to take, and I must give effect to that intention—an intention which I arrive at not from any conjecture as to what the testatrix meant, but from the will itself with the assistance of such surrounding circumstances as I am bound to look at. I therefore decide that the two illegitimate children of Mary Ann Burns are entitled to shares in the residue.

Solicitors: *Farmer & Carpenter; Crossfield, Cushing & Wheldon.*

(1) L. R. 6 H. L. 282.

J. R. B.



CROSTHWAITE FIRE BAR SYNDICATE *v.* SENIOR. PARKER J.

[1908 C. 3175.]

1909

March 2.

*Patent—Alleged Infringement—Defence of Prior User—Particulars—Rules of the Supreme Court, 1883, Order LIII.A, r. 18.*

The keynote of the provision in Order LIII.A, r. 18—that where prior user is alleged as an objection to the validity of a patent the particulars of the prior user must “contain a description (accompanied by drawings if necessary) sufficient to identify such alleged prior user, and if such user relates to any machinery or apparatus shall specify whether the same is in existence and where the same can be inspected”—is in the words “sufficient to identify such alleged prior user,” and the object of the rule was to meet the difficulties which arose under the former practice by reason of a party being ignorant up to trial as to the case of prior user which he had to meet, and his opponent being unfettered as to what at the trial he should adduce as an example of prior user.

Nature of order to be made on application for further particulars of prior user.

THE Crosthwaite Fire Bar Syndicate, Limited, the registered legal owners of letters patent No. 21514\* of 1900 for improvements in firebars for furnaces, and W. G. Crosthwaite, the registered legal owner of letters patent No. 1987 of 1907 for other improvements in firebars for furnaces, brought an action against Arthur Senior and others, trading together as the S. B. Furnace Company, to restrain them from infringing the letters patent and for consequent relief.

The defendants by their statement of defence denied the alleged infringement and pleaded that both patents were invalid for the reasons stated in the accompanying particulars of objections. In respect of the first-named patent the particulars alleged prior publication of the alleged invention by publication of certain specifications and documents numbered 1 to 8, and prior public user because “the said alleged invention had been published in this realm prior to the date of the said letters patent by the erection and use by the following firms and companies of furnaces having grates constructed and arranged as claimed in all the claiming clauses of the said specification.”

Then followed a table in five columns, headed respectively

PARKER J. "Name," "Number of furnaces," "Place of user," "Time of user," and "Place where such furnaces may be inspected."

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In column 1, in items numbered 9 to 12, were stated the names of three corporations and one firm. Opposite each of these names, in column 2, was the word "one." In column 3 were stated the places of user. In column 4 the times of user were stated. In column 5, against three of the items (9, 10, and 12) the places for inspection were stated, but opposite item 11 were the words "not in use."

In respect of the secondly named patent the particulars alleged prior publication and prior public user and stated that the defendants would rely as to prior publication and as to prior public user on the above-mentioned and some further documents and matters alleged, and there was another similar table referring to other companies, numbered 16 to 20, each of which was stated to have "one furnace" in use at a certain place, the times of user and the places for inspection being also stated.

The plaintiffs applied in chambers on an appointment under the summons for directions that the defendants might be ordered to deliver further particulars with descriptions and drawings of the several instances of prior user of the plaintiffs' inventions alleged in the particulars and defence, and that in default the defendants might not be at liberty at the trial to adduce evidence of prior user. The application was adjourned into Court.

*T. Terrell, K.C., and Courtney Terrell, for the plaintiffs.* The particulars as to prior user are insufficient. By Rules of the Supreme Court, 1883, Order LIII.A, r. 18, if one of the objections is want of novelty, the particulars of objections "must state the time and place of the previous publication or user alleged, and if it be alleged that the invention has been used prior to the date of the patent, must also," besides specifying certain matters, "contain a description (accompanied by drawings if necessary) sufficient to identify such alleged prior user, and if such user relates to any machinery or apparatus shall specify whether the same is in existence and where the same can be inspected." In a recent similar case *Swinfen Eady J.* ordered particulars to be given. We not only want to know what case we

have to meet, but want the defendants to be bound under the second part of the rule (as to giving evidence) not to go beyond their particulars.

[PARKER J. It is sufficient in each case for the Court to say whether the description in the particulars is sufficient to enable the thing to be identified.]

The rule goes further than merely making further provision for identification, as to which *In re Brown's Patent* (1) may be referred to. The case is essentially one in which either drawings should be given, or we should have the opportunity of ourselves making drawings.

[PARKER J. The defendants offered in chambers to point out the particular firebars in question. The rule was made to prevent such things as occurred in *Robertson v. Purdey*. (2)]

*J. Hunter Gray*, for the defendants. The defendants will give a further description of item 11, the furnace stated to be "not in use," and will point out in situ the particular grate or grates alleged to constitute prior user. Drawings are not always necessary. The rule aims at enabling proper identification to be obtained, for it only requires to be given a description "sufficient to identify such alleged prior user."

*T. Terrell, K.C.*, in reply.

PARKER J. This is a point arising on the construction of Order LIII.A, r. 18, which provides that where prior user is alleged as an objection to the validity of a patent the particulars which are given of such prior user are to "contain a description (accompanied by drawings if necessary) sufficient to identify such alleged prior user, and if such user relates to any machinery or apparatus shall specify whether the same is in existence and where the same can be inspected."

I think that the keynote to that provision is in the words "sufficient to identify such alleged prior user," and that the object of the rule was to meet difficulties such as arose in *Robertson v. Purdey* (2), the single trigger gun case, where a prior user of thirty years was alleged, and the other party was not able to see of what the prior user consisted, or the article which was alleged

(1) (1906) 23 Rep. Pat. Cas. 790.

(2) (1907) 24 Rep. Pat. Cas. 273.

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—

to have been used in such a manner as to constitute the anticipation, prior to the time when it was actually produced in the witness-box. That, of course, was exceedingly inconvenient. Not only did one of the parties not know what case he would have to meet, but it really left it open to the defendant not to tie himself down with regard to any particular gun, but to produce that gun which he might subsequently discover most nearly to approach the invention which was said to be anticipated.

In the present case the action is for infringement of a patent, and the validity of the patent is objected to on the ground that "the said alleged invention had been published in this realm prior to the date of the said letters patent by the erection and use by the following firms and companies of furnaces having grates constructed and arranged as claimed in all the claiming clauses of the said specification." Up to that point there is an allegation of prior user and that the articles used consisted of grates constructed and arranged as claimed in all the claiming clauses of the specification. Then follows a table in which are stated the names of the persons who use the grates, the number used, the place of user, the time of user, and the places where furnaces containing the grates may be inspected. In a sense, that is not quite a sufficient description for identification, because it does not mark or point out the particular furnace, but only refers to it as one of the furnaces being used. But the defendants in the present case have offered to point out in situ the particular furnace to which they refer, and to procure, if they can, the full inspection of that furnace by the plaintiffs. Under those circumstances it appears to me that, with that addition, there will be a sufficient identification of the particular article which the defendants say has been used prior to the date of the patent, and the use of which constitutes the prior user on which they rely.

There is another particular which refers to the company which made the prior user, the place where it was used, and the time of user, but states that the grate in question is "not now in use." With regard to that, the description, in my opinion, is clearly insufficient, and in that case, production being impossible, I am of opinion that the defendants are bound, according to the rules, to give a description of the grate, with drawings if necessary, such



description and drawings, if there be drawings, being sufficient to identify it—that is, to shew what is going to be alleged at the trial to have been the nature of the article the use of which is relied on as a prior user.

If those two things are done—that is to say, if a further description is given as to the one numbered 11, and an undertaking is given in the form which I have already suggested with regard to the rest, and effect is given to that undertaking, and the plaintiffs have inspection of the articles which may be pointed out to them in situ—it appears to me that sufficient will have been done to identify the prior user on which the defendants intend to rely, and that there will be no need for them to give a detailed description or drawings of the articles in question, these articles being otherwise sufficiently identified.

In my opinion, therefore, an order should be made, very much in the way that I suggested in chambers, for further particulars, containing a description, with drawings if necessary, sufficient to identify No. 11 in the table, the defendants undertaking as regards Nos. 9, 10, 12, 16, 17, 18, 19, and 20 to point out to the plaintiffs, or their agents or experts, or any of them, in situ, upon a day or days to be fixed for that purpose, the particular grate the user of which is said to constitute a prior user, or the particular grates the users of which are said to constitute prior users, and to do their best to procure an opportunity for the plaintiffs to have full inspection of the same, the rest of the summons standing over, with liberty to restore the same if such inspection cannot be given.

Solicitors for plaintiffs: *Bell, Brodrick & Gray, for W. H. Clarke, Middleton & Stott, Leeds.*

Solicitors for defendants: *W. J. & E. H. Tremellen, for Emsley & Son, Leeds.*

F. E.

PARKER J.  
1909  
CROS-  
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v.  
SENIOR.

PARKER J.

1909

Feb. 19, 23;  
March 9.

*In re* SEWELL.WHITE *v.* SEWELL.

[1908 S. 1775.]

*Will—Trustee—Retainer—Debt due from Legatee to Estate—Liability to account—Satisfaction of Debt—Bankruptcy—Composition—Acceptance of Dividend—Assent to Composition—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 18, 19, 30.*

Two trustees of a will misappropriated and lost part of the trust funds. A receiving order was made against them under the Bankruptcy Act, 1883, and a composition was agreed to and approved by the Court under which a dividend of 6s. in the pound was to be accepted by the creditors in full discharge of their debts. New trustees of the will were appointed, and they received the dividend of 6s. in the pound. The estate became divisible, and the trustees claimed to retain the share of it to which one of the defaulting trustees was beneficially entitled in order to make good the loss which he had caused to the estate:—

*Held*, that by receiving the dividend the trustees had assented to the composition; that the debt due to the estate by the defaulting trustee was no longer in existence; and that he was therefore entitled to have his share of the estate paid to him.

JOSEPH SEWELL and C. J. Sewell employed in their private business funds of which they were trustees under the will of John Sewell and in part of which they were also beneficially interested. A receiving order was made against them in 1885. A composition under the Bankruptcy Act, 1883, was confirmed by their creditors and approved by the Court on December 18, 1885, and a deed of assignment of all their property to trustees for their creditors was executed by them. The order provided that dividends amounting to 6s. in the pound should be accepted by the creditors in full discharge of their debts. By an order made by Kay J. on December 19, 1885, the Court appointed J. Wells and H. White trustees of the will in substitution for Joseph and C. J. Sewell with the right to sue for and recover any chose in action subject to the trusts of the will. Wells and White as trustees of the will proved under the composition for the loss sustained by the estate and received dividends amounting to 6s. in the pound.

Joseph Sewell died on March 1, 1907.

In the events which had happened the estate of the testator John Sewell had recently become divisible. C. J. Sewell was beneficially entitled to one fourth of the estate, and the surviving trustee took out this summons to determine (inter alia) the question whether C. J. Sewell ought not to make good to the estate the funds which he had appropriated and lost by the composition before he could claim to receive his one fourth share of the estate.

PARKER J.

1909  
SEWELL,  
*In re.*  
WHITE  
*v.*  
SEWELL.

*T. L. Wilkinson*, for the summons.

*F. A. Milne*, for the representatives of J. Wells who were beneficially interested in the estate. A person who owes an estate money, that is to say, who is bound to increase the general mass of the estate by a contribution of his own, cannot claim a share given to him out of that mass without first making the contribution which completes it: *Cherry v. Boulton* (1); *Courtenay v. Williams* (2); *In re Akerman*. (3) In the present case C. J. Sewell has already had a larger share in the trust estates than he ought to have had. Therefore, before he can take any benefit under John Sewell's will, he must refund to the estate that part of it which he employed and lost in his own business.

*E. E. H. Brydges*, for Ethel Margaret Sewell in the same interest. A defaulting trustee cannot claim as against his cestuis que trust any beneficial interest in the trust estate, even although he may have become entitled thereto derivatively: *Jacobs v. Ryland* (4); *Doering v. Doering*. (5) The personal interests of a trustee in a trust fund are applicable to the discharge of all claims against him as trustee: *Irby v. Irby* (No. 3) (6); *In re Brown*. (7) The fact that the new trustees proved in the composition does not affect the equity of the cestuis que trust. A trustee cannot by proving in bankruptcy prejudice his cestuis que trust—*Ex parte Dicken* (8)—although an executor can do so:

(1) (1839) 4 My. & Cr. 442.

(4) (1874) L. R. 17 Eq. 341.

(2) (1844) 3 Hare, 539; (1846) 15

(5) (1889) 42 Ch. D. 203.

L. J. (Ch.) 204.

(6) (1858) 25 Beav. 632.

(3) [1891] 3 Ch. 212.

(7) (1886) 32 Ch. D. 597.

(8) (1817) Buck, 115.

PARKER J. *Stammers v. Elliott* (1); Lewin on Trusts, 11th ed. p. 1158. A trustee who makes a composition with his creditors is not within the rule of *Ex parte Jacobs* (2); Williams' Bankruptcy Practice, 9th ed. p. 81; s. 15 of the Debtors Act, 1869. No debt is set up against C. J. Sewell, but he has already in effect been paid his share and cannot have it again.

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SEWELL,  
*In re.*  
WHITE  
v.  
SEWELL.

*A. M. Galer*, for C. J. Sewell. In order to enforce this equity the cestuis que trust must prove that there is a debt due to them by the trustee: *Corr v. Corr* (3); *In re Weston*. (4) The liability to make good this trust fund was discharged by the composition, and there is no existing liability to which the doctrine can apply: *In re Bruce*. (5) The new trustees proved in the composition, and their right of retainer is 'gone altogether: *In re Watson* (6), following *Stammers v. Elliott* (1) and *Armstrong v. Armstrong*. (7) The liability was discharged by the composition under s. 18 of the Bankruptcy Act, 1883, just as much as if there had been an adjudication. The trustees clearly assented to it within s. 19; and s. 18, sub-s. 15, and s. 30 do not apply.

PARKER J. In my opinion the equity which has been asserted, sometimes with success and sometimes without success, in the various cases which have been quoted—for instance *Courtenay v. Williams* (8), *Irby v. Irby* (No. 3) (9), and *In re Akerman* (10), and similar cases—depends upon the existence of a liability on the part of the person against whom it is asserted to pay money to an estate in the distribution of which he is interested. This liability may be legal or equitable only, and it may or may not be a liability which is enforceable by action. But in my opinion the liability must exist when the equity is asserted. It is not enough that it previously existed and has been released prior to the time when the equity is asserted. This is shewn by other cases to which I have been referred, and in particular by *Stammers v.*

(1) (1868) L. R. 3 Ch. 195, 200.

(2) (1875) L. R. 10 Ch. 211.

(3) (1879) 3 L. R. Ir. 435.

(4) [1900] 2 Ch. 164.

(5) [1908] 2 Ch. 682.

(6) [1896] 1 Ch. 925, 933.

(7) (1871) L. R. 12 Eq. 614.

(8) 3 Hare, 539; 15 L. J. (Ch.)

204.

(9) 25 Beav. 632

(10) [1891] 3 Ch. 212.



*Elliott* (1), *Armstrong v. Armstrong* (2), *In re Orpen* (3), and *PARKER J. In re Watson*. (4)

1909  
SEWELL,  
*In re.*  
WHITE  
*v.*  
SEWELL.

I do not think that it makes any difference whether the liability be to executors for a debt or to trustees for a breach of trust. *Ex parte Dicken* (5) is, in my opinion, only an authority as to the propriety of allowing trustees who have proved in bankruptcy without valuing their security, or realizing it, subsequently to amend their proof. There the Lord Chancellor held that in the events which had happened the trustees had a lien upon certain real estate for 4000*l.* which the bankrupt had covenanted to pay to them. They proved in the bankruptcy without regard to that lien, and as that would have caused an injustice to their cestuis que trust, the Lord Chancellor allowed them to amend their proof and to prove for the balance after deducting the proceeds of the realization of their security.

In the present case the trustees invested the whole of the trust funds in their private business. In 1885 a receiving order was made against them under the provisions of the Bankruptcy Act, 1883, and subsequently, prior to adjudication, special resolutions were duly passed by their creditors and confirmed by the Court under s. 18 of that Act accepting a composition. A composition accepted by resolutions of creditors and approved by the Court is by sub-s. 8 of s. 18 made binding on all creditors so far as it relates to any debts due to them from the debtor and provable in bankruptcy. Shortly after approval of the scheme of arrangement new trustees were appointed, and they proved for and accepted the composition, thereby, in my opinion, assenting to the composition within the meaning of s. 19. This s. 19 was intended to take the place of s. 15 of the Debtors Act, 1869, as to compositions made under the Act of 1883. Sect. 15 of the Debtors Act, 1869, apparently only applied to compositions under the Bankruptcy Act, 1869, and contained an express provision that proving a debt and accepting a dividend were not to be an assent to the composition. There are no such words in s. 19 of the Act of 1883, and sub-s. 15 of s. 18 appears to me only to preserve

(1) L. R. 3 Ch. 195.

(3) (1880) 16 Ch. D. 202.

(2) L. R. 12 Eq. 614.

(4) [1896] 1 Ch. 925.

(5) Buck, 115.

PARKER J. the liability of third parties and not to touch the question whether under the general operation of the Act the debtor is or is not discharged. Whether, therefore, the debt or liability in question was one which would or would not be discharged by an order of discharge in bankruptcy, it was in my opinion released or satisfied by the composition, and this appears to me to bring the case within *Stammers v. Elliott* (1), *Armstrong v. Armstrong* (2), *In re Orpen* (3), and *In re Watson* (4), and consequently the equity which the trustees now assert does not arise.

Solicitors: Noon, Clarke & Churchill.

H. C. R.

PARKER J.

1909

April 1.

*In re* VINCENT.

ROHDE *v.* PALIN:

[1905 V. 845.]

*Will—Construction—Gift to Class—Inquiry—Ascertainment of Persons entitled to Legacy—Costs—Residue—“Otherwise direct”—Rules of the Supreme Court, Order LXV., r. 14B.*

By his will the testator gave his residuary real and personal estate to trustees upon trust for sale and conversion and to invest the proceeds after payment thereof of his funeral and testamentary expenses, debts, and legacies and to pay the income to his wife, and after her death to raise certain legacies, and upon further trust to raise 6000*l.* for the benefit of a class of persons therein described, and to pay the ultimate residue to his brother and sisters in equal shares. The testator died in 1891, and his widow in 1905. In November of that year an order was made directing an inquiry who were the beneficiaries composing the class entitled to the 6000*l.* The inquiry was completed, and the trustees now asked for taxation of costs and a declaration that the costs down to the order of November, 1905, should be paid out of the ultimate residue, and that the subsequent costs should be paid out of the funds representing the 6000*l.* :—

*Held*, that the costs of the inquiry were testamentary expenses and ought to be paid out of residue; that Rules of the Supreme Court, Order LXV., r. 14B, had not put an end to the power of the Court to make an order carrying out the intention of the testator; and that all the

(1) L. R. 3 Ch. 195.

(2) L. R. 12 Eq. 614.

(3) 16 Ch. D. 202.

(4) [1896] 1 Ch. 925.

costs of ascertaining the members of the class, except so far as they had been increased by incumbrances on the shares, must be paid out of the residue and not out of the 6000ℓ. PARKER J.

1909

VINCENT,  
*In re.*  
ROHDE  
v.  
PALIN.

By his will dated October 29, 1890, John Vincent appointed executors and trustees and after making sundry dispositions directed his trustees to stand possessed of his real estate and the residue of his personal estate upon trust for sale and conversion, and to invest the proceeds after payment thereof of his funeral and testamentary expenses, debts, and legacies and to pay the income to his wife for life, and after her death upon trust to raise certain legacies, "and upon further trusts out of my residuary estate to raise the sum of six thousand pounds and to pay the same free of legacy duty to and amongst the child or children living at my wife's death and the issue then living of any child or children then dead of James Heath now or formerly of Great Neston near Chester and of Joseph Heath now or formerly of Little Heath in the parish of Audlen near Nantwich Cheshire (maternal uncles of my first wife Catherine Mary Anne Massey) and of Catherine George Cross formerly of Nantwich paternal aunt of my said first wife to take if more than one as tenants in common per stirpes or if at the death of my said wife there shall be no child or issue living of any or either of them the said James Heath Joseph Heath and Catherine George Cross the whole of the said six thousand pounds shall be paid and divided to and amongst the child or children living at my said wife's death and the issue then living of any child or children then dead of the other or others of the above three named persons as tenants in common per stirpes; And as to the ultimate residue of my residuary estate upon trust to pay transfer and divide the same to and amongst my brother William and sisters Sarah and Catherine in equal shares and as to my said sisters for their respective separate use."

The testator died in 1891, and his widow died in January, 1905. By an order made on November 20, 1905, on an originating summons issued by the trustees, an inquiry was directed who were the beneficiaries entitled to the 6000ℓ. The order said nothing about costs. The inquiry took a considerable time; thirty-eight persons claimed to be entitled to share in the 6000ℓ.;

PARKER J. and a question on the true construction of the clause was decided by the Court.

1909  
 VINCENT,  
*In re.*  
 ROHDE  
*v.*  
 PALIN.

This was an application by the plaintiffs that the costs of all parties as between solicitor and client should be taxed and for a declaration that the costs down to and inclusive of the order of November 20, 1905, should be paid out of the residuary estate of the testator, and that the subsequent costs should be paid out of the funds representing the legacy of 6000*l.*, and the balance paid to the parties mentioned in the Master's certificate.

*E. Beaumont*, for the trustees.

*Romer, K.C.*, and *Percy Wheeler*, for persons interested in the 6000*l.* All the costs ought to be paid out of the general residue. The testator directed that his testamentary expenses should be paid thereout, and the costs of the inquiry are testamentary expenses: *In re Gibbons' Will* (1); *In re Groom*. (2) The discretion of the Court with regard to these costs is not taken away by the Rules of the Supreme Court, Order LXV., r. 14B, which provides that "the costs of inquiries to ascertain the person entitled to any legacy, money, or share, or otherwise incurred in relation thereto, shall be paid out of such legacy, money, or share, unless the judge shall otherwise direct." The direction to pay testamentary expenses out of residue is sufficient to enable the Court to "otherwise direct": *In re Baumgarten*. (3)

*Martelli, K.C.*, and *Hodge*, for persons interested in the ultimate residue. Order LXV., r. 14B, applies to this case. The rule would not have been made if it had been intended to leave the discretion of the Court exactly as it was. It was probably introduced in order to meet the judgment in *In re Gibbons' Will* (1), and if it does not apply to such a case as this it might as well be struck out altogether. On the construction of the will we submit that these costs are not testamentary expenses within the intention of the testator. They could not be incurred till the death of the tenant for life and were not costs of the executors as such: *Sharp v. Lush* (4); *In re Clemow*. (5) The costs

(1) (1887) 36 Ch. D. 486.

(3) (1900) 82 L. T. 711.

(2) [1897] 2 Ch. 407.

(4) (1879) 10 Ch. D. 468.

(5) [1900] 2 Ch. 182.



of the inquiry ought to be distinguished from the costs of PARKER J. construing the will.

*Romer, K.C.*, in reply.

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 VINCENT,  
*In re.*  
 ROHDE  
 v.  
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PARKER J. The testator gave his property generally upon trust for a tenant for life, and after her death he directed that out of his residue 6000*l.* should be raised and paid to a class of persons whom he specified, and he gave the ultimate residue to three persons who are sufficiently named in the will. On the true construction of that will it appears to me that the testator intended the persons included in the class to get the 6000*l.* before his brother and sisters got anything; in other words, the gift to the brother and sisters is in the nature of a residuary gift, and they are to get nothing until the others have got their full 6000*l.* Having regard to that, if I am to give effect to the intention of the testator, the costs of the administration of the trusts should come out of the residue before anything is paid to the persons entitled to the residue, and that would have been the ordinary way of dealing with the costs before Order LXV., r. 14*B*, came into force; and that is the order I should have made if the rule had not existed. The question is whether the rule has altered my discretion so that I cannot make that order. The rule appears to me to be framed in a somewhat ambiguous way. It is as follows: "The costs of inquiries to ascertain the person entitled to any legacy, money, or share, or otherwise incurred in relation thereto, shall be paid out of such legacy, money, or share, unless the judge shall otherwise direct."

Of course the whole of these costs have been incurred in relation to the 6000*l.*, and if a literal meaning is to be given to the earlier words of the rule, and if the concluding words of the rule are to have no effect, it is clear that the costs must fall upon that fund in respect of which they have been incurred. So if the rule is construed literally and precludes the judge from doing what he would otherwise have done the whole of the costs should come out of the 6000*l.* But it is clear that the interpretation given to the rule by the Court does not bear that out, for it has been held by Farwell J. in *In re Baumgarten* (1), where there

(1) 82 L. T. 711.

PARKER J. was a direction that testamentary expenses should be paid out of residue and an inquiry as to what persons were entitled to legacies, that the costs of the inquiry came out of the residue as testamentary expenses. That is to say, Farwell J. did "otherwise direct" under the latter part of the rule, to give effect to the testator's intention. In the present case the testator's intention, though not expressed, seems equally clear, and I think I may still give effect to the wishes of the testator and am not bound by the rule in the literal sense. Therefore if I think fit I can order the costs of the inquiry to come out of the residue notwithstanding the rule. That is what I propose to do, for I do not think I should be giving effect to the intention of the testator if I made the costs of ascertaining who were the persons entitled to the 6000*l.* come out of their legacies; because in my opinion they were intended to get 6000*l.* before the residuary legatees got anything. In my opinion, therefore, the costs of the inquiry, including the costs of the present application, should be paid out of the residue. But I except from them any increase of the costs which may have been occasioned by any of the parties having incumbered their shares. It would not be fair that those costs should fall on the residue, and such costs ought to come out of the shares in respect of which they have been incurred in the ordinary way.

Solicitors: *Shepheards & Walters; Robert Greening, for Laces & Co., Liverpool; Gush, Phillips, Walters & Williams.*

H. C. R.

*In re* RODES.

PARKER J.

SANDERS *v.* HOBSON.

1909

March 31;

April 1, 6.

[1883 D. 672.]

*Tenant for Life and Remainderman—Capital or Income—Surrender of Lease—Consideration paid to Tenant for Life—Casual Profit—Trustee—Settled Land Act, 1882 (45 & 46 Vict. c. 38), ss. 6, 13, 53.*

Money paid to an equitable tenant for life by a lessee as consideration for accepting a surrender of a lease, which has been granted by the tenant for life under the powers of the Settled Land Acts, does not belong to him as a casual profit, but must be paid by instalments to him and other persons entitled to the rent.

*In re Hunloke's Settled Estates*, [1902] 1 Ch. 941, distinguished.

By his will made in February, 1883, W. H. de Rodes devised his real estate to trustees upon trusts under which the plaintiff Sophy Felicité Sanders, now Mrs. Locker Lampson, was tenant for life and her daughter Felicity Locker Lampson, an infant, was tenant in tail in remainder. The rents and profits were to be accumulated during the minority of any tenant for life; and the trustees had power to grant leases and accept surrenders of any part of the estate. The testator died in 1883, and in the same year an action was commenced for administration of his estate. On March 22, 1896, the plaintiff attained the age of twenty-one, and by an order of the Court made on August 3, 1896, by Chitty J. she was let into possession of the estate. In 1905 she married Mr. G. L. T. Locker Lampson.

In the year 1889 the trustees had commenced an action to recover rent and royalties due from tenants under a mining lease for thirty-nine years from February 7, 1859, granted by the testator in 1863. This action was compromised on payment by the lessees to the trustees of a sum of 3000*l.* By the order of August 3, 1896, it was declared that this 3000*l.* ought to be regarded as having been paid in satisfaction of the rents and royalties under the lease which would have accrued due between March 25, 1886, when the last payment of rent was made, and February 7, 1898, when the lease would have determined, and

PARKER J. must be apportioned between the persons entitled to the estate during that period ; that 2535*l.* 5*s.*, the part which would have been payable up to March 22, 1896, when Mrs. Locker Lampson attained twenty-one, formed part of the capital ; and that the remaining 464*l.* 15*s.*, being the part which would have been payable between that date and February 7, 1898, represented income, and that this income must be paid by instalments to the persons entitled to the income as follows : on September 22, 1896, 126*l.* 15*s.* ; on March 22, 1897, 126*l.* 15*s.* ; on September 22, 1897, 126*l.* 15*s.* ; and on February 7, 1898, 84*l.* 10*s.*

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RODES,  
*In re.*  
SANDERS  
*v.*  
HOBSON.

The testator had also granted another mining lease for forty-two years from January 1, 1871, and in 1895 a compromise was arrived at between the trustees and the lessees in respect of rents and royalties due and to become due under that lease, whereby the lessees paid to the trustees 4000*l.* and 407*l.* 10*s.* for surface drainage, and the trustees accepted a surrender of the premises. By the order of August 3, 1896, it was declared that the 4000*l.* ought to be regarded as being paid in satisfaction of rents and royalties ; that 190*l.* 4*s.* 3*d.* represented money payable before March 22, 1896, and formed part of the capital of the estate ; and that 3809*l.* 15*s.* 9*d.* represented payments which would have accrued between that date and January 1, 1913, and must be treated as income and paid by instalments to the parties entitled. The order also declared that the 407*l.* 10*s.* was capital.

On June 30, 1906, Mrs. Locker Lampson, in exercise of the powers by the Settled Land Act, 1882, for that purpose vested in her as tenant for life in possession, granted to three persons a lease of a coal mine forming part of the estate for twenty-one years from July 1, 1906, at a minimum rent of 200*l.*, with royalties in addition. On September 24, 1906, the lessees assigned this lease to a company. In March, 1908, the company passed resolutions for a voluntary winding-up. On December 22, 1908, in consideration of 1000*l.* paid to Mrs. Locker Lampson by the lessees, she accepted a surrender of the demised premises to the intent that the residue of the term should be merged in the inheritance.

The question then arose whether Mrs. Locker Lampson was entitled to retain the 1000*l.* or whether some or all of it ought



to be treated as capital, and the surviving trustee took out a PARKER J.  
summons for directions.

*Christopher James*, for the trustees. This 1000*l.* ought to be paid by instalments to the tenant for life or other persons entitled, in accordance with the order of August 3, 1896.

*T. T. Methold*, for the tenant for life. Mrs. Locker Lampson is entitled to retain the whole 1000*l.* for her own benefit as a casual profit: *In re Hunloke's Settled Estates*. (1) In that case the surrender was made to a legal tenant for life, whereas Mrs. Locker Lampson is an equitable tenant for life acting under the powers of the Settled Land Act; but that does not alter the general rule: Wolstenholme's Conveyancing and Settled Land Acts, 9th ed., note to s. 13, p. 354. The remaindermen will not be prejudiced, for the minerals still remain unworked. The order of August 3, 1896, does not affect this question, for the sums thereby apportioned were paid in respect of compromises of claims for arrears of rent due under leases granted by the testator.

*H. B. Vaisey*, for the infant entitled in remainder. The whole of this 1000*l.* ought to be treated as capital and paid to the trustees for investment. This case is distinguishable from *In re Hunloke's Settled Estates* (1) on two grounds—first, Mrs. Locker Lampson is an equitable, not a legal, tenant for life, and, secondly, she acted under the powers conferred by the Settled Land Act, 1882, ss. 6 and 13. The first ground is not merely technical, for the result was that the surrendered lease merged in the estate of the trustees, not in that of the tenant for life. Secondly, a tenant for life is by s. 53 of the Act deemed to be in the position of a trustee when exercising any power under the Act, so Mrs. Locker Lampson cannot retain this money for her own use. Common law powers and powers given by a will to a tenant for life, as in *In re Hunloke's Settled Estates* (1), are not fiduciary.

[PARKER J. referred to *Brigstocke v. Brigstocke*. (2)]

The note in Hood and Challis' Conveyancing, Settled Land, and Trustee Acts, 6th ed. p. 227, on s. 13 does not agree that money received on a surrender under the Settled Land Act belongs to the

(1) [1902] 1 Ch. 941.

(2) (1878) 8 Ch. D. 357.

PARKER J. tenant for life. In Farwell on Powers, 2nd ed. p. 622, it is said that the better opinion on the construction of the Act is that money paid by a lessee on a surrender under the Act should be treated as capital; and the fact that a fine received on the grant of a lease is by s. 4 of the Settled Land Act, 1884, to be deemed capital money supports this view. At all events we ask that the money should be apportioned as in the common form on a sale of leaseholds.

1909  
RODES,  
*In re.*  
SANDERS  
*v.*  
HOBSON.

*T. T. Methold*, in reply.

PARKER J. The question is whether on the true construction of s. 13, sub-s. 1, of the Settled Land Act, 1882, a tenant for life who accepts a surrender of a lease for a pecuniary consideration is entitled to retain that consideration for himself, and *In re Hunloke's Settled Estates* (1) has been referred to. That was a case in which a legal tenant for life accepted a surrender without reference to the Settled Land Acts, and it was held by Swinfen Eady J. that she was entitled to retain the moneys paid to her in consideration of the surrender. But if the case be examined it appears that the reasons for the decision were that *prima facie* the position of a legal tenant for life is not fiduciary, and also that in cases where powers of leasing are conferred on a legal or equitable tenant for life by deed or will the power is construed as non-fiduciary and as having no reference to the interests of the remaindermen, but only to those of the tenant for life. On the other hand, under s. 53 of the Settled Land Act, 1882, the tenant for life is a trustee, and if he accepts a surrender he must do so for the interests not only of himself, but for those of the remaindermen, and if he receives a consideration for accepting it, then, on ordinary principles, a Court of Equity will distribute the money between the tenant for life and the remaindermen on principles which it thinks fair. That is done on account of the position of the tenant for life as a trustee and in order to see that justice is done between the parties. In the present case it is clear that, inasmuch as the tenant for life has been paid a considerable sum, it will be difficult to let the property on such advantageous terms again, and so it is for the disadvantage of

(1) [1902] 1 Ch. 941.

the remaindermen that the surrender should be accepted, unless the money paid for the surrender is so dealt with as to recoup them. The money received for this surrender must therefore be paid by instalments to the tenant for life or other the person or persons entitled for the time being in the same way as in the preceding cases dealt with by the order of August 3, 1896.

PARKER J.  
1909  
RODES,  
*In re.*  
SANDERS  
*v.*  
HOBSON.

Solicitors : *Lowe & Co. ; Freshfields.*

H. C. R.

*In re* PEARCE.

CRUTCHLEY *v.* WELLS.

[1908 P. 2401.]

EVE J.  
1909  
*April 5.*

*Administration—Specific Legacy—Interval between Death of Testator and Assent of Executor—Cost of Upkeep and Preservation—Incidence.*

The expense incurred in the upkeep and preservation of specifically bequeathed property between the death of the testator and the assent of his executors to the bequest is payable by the specific legatee, and not out of the general estate of the testator.

#### ADJOURNED SUMMONS.

The testator Sir W. G. Pearce, Bart., bequeathed to his wife all his furniture and effects, horses, carriages, motor cars, yacht, and jewellery, and gave his residuary estate to the plaintiffs, his executors and trustees, upon trust to pay the income thereof to his wife during her life, and after her death upon trust, in the events which happened, for Trinity College, Cambridge, absolutely.

The testator died on November 2, 1907, and his will and codicils were proved by the plaintiffs on December 18, 1907, the gross value of his estate being sworn at the sum of 469,764*l.* 12*s.* 2*d.*

The testator's widow died on December 23, 1907, having by her will appointed the defendants S. R. Wells and G. G. Vertue her executors, who proved her will on March 28, 1908.

After the death of the testator the plaintiffs incurred considerable expense in retaining a large part of the staff of men and women servants in one of the testator's houses in order to maintain and keep in good order the furniture and effects thereof and to look after the horses and carriages specifically bequeathed

EVE J.

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PEARCE,

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by the testator to his wife, and in paying the wages and expenses of the captain of the yacht and in repairs to the yacht.

The plaintiffs assented to the different specific bequests at various dates between March 23, 1908, and May 14, 1908.

Subsequently the plaintiffs took out this summons for the determination of the question whether the estate of the testator's widow should bear any, and what, part of the cost of the upkeep, care, and preservation of the furniture and effects, horses and carriages, and yacht.

*Sheldon*, for the plaintiffs.

*T. T. Methold*, for the defendant executors. I submit that the liability of a specific legatee for expenses of this nature begins at the assent of the executors and not before. The captain of the yacht and the domestic servants were in the service of the testator, and his general estate is liable for their wages. Executors are bound to preserve and protect articles specifically bequeathed until they can reasonably assent to the legacy: *Field v. Peckett* (No. 3). (1) This is an analogous case to that of *Marshall v. Holloway* (2), where the personal estate and not the particular leasehold property was held liable on the testator's covenant to build.

The expense of getting in and remitting property specifically bequeathed is payable out of the general estate as part of the expenses of the administration: *Perry v. Meddowcroft* (3); *Cockerell v. Barber* (4); Williams on Executors, 10th ed. p. 1178.

*Christopher James*, for the defendants Trinity College, Cambridge. The executors' assent relates back to the testator's death: *Saunders' Case* (5); Williams on Executors, 10th ed. p. 1108. That being so, then the specific chattels belong to the legatee as from the death, and I submit that, just as he is entitled to the benefits accrued (Williams on Executors, 10th ed. p. 1162), so he is liable for the costs of the upkeep during that time. Surely it would never be contended that a specific legatee of leaseholds was not liable for the rent before the assent was given.

(1) (1861) 29 Beav. 576.

(2) (1832) 5 Sim. 196.

(3) (1841) 4 Beav. 204.

(4) (1810) 16 Ves. 461.

(5) (1599) 5 Rep. 12a.



If in the present case the yacht had been let out on hire during the interval between the testator's death and the assent, I submit that the specific legatee would have been entitled to the profits. The cases cited on behalf of the specific legatee are not applicable. It is the duty of the executors to preserve the property specifically bequeathed, and they preserve it for the benefit of the specific legatee, and it is only reasonable that the latter should bear the expense of the upkeep.

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PEARCE,  
*In re.*  
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v.  
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EVE J. stated the facts, and continued :—The question which I have to decide is whether the moneys which have been expended ought to come out of the general estate or ought to be borne by the specific legatee. Now it seems to be settled law that when an executor gives his assent to a specific legacy the assent relates back to the death of the testator, and the specific legatee is entitled to the profits accrued due from the time of the testator's death. That being so, it seems to me to be right and fair that the specific legatee should be charged with the costs of the upkeep, care, and preservation of the specific legacy from the time of the death until the executor's assent, and I shall make a declaration to that effect, and direct an inquiry what expenses were properly incurred in and for such upkeep, care, and preservation.

Solicitors : *Stibbard, Gibson & Co. ; Vertue & Castle.*

R. M.

END OF VOL. I.



The Mode of Citation of the Volumes of the *Law Reports*, commencing January 1, 1909, will be as follows :—

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In 1866 A. mortgaged freeholds to D. in fee. In 1867 D. charged his mortgage debt and created a term of 1000 years to secure the charge. In 1868 D. foreclosed A., and between

**ADMINISTRATION**—*continued.*

1870 and 1872 mortgaged the fee to G. to secure sums amounting to 5411*l.* In 1872 D. by his marriage settlement also charged the fee with 5000*l.*, which sum, in the events which happened, became held in trust for him. In 1874 D.'s equity of redemption under his mortgages of 1870 to 1872 and his interest in the 5000*l.* were conveyed to G. subject to all existing charges and with a declaration against merger. In 1900 G. took a transfer of the charge (then reduced to 9800*l.*) and term of years created by the mortgage of 1867 with a declaration against merger, and in 1902 he deposited the deeds of 1866, 1867, and 1900 with a memorandum of deposit with M. by way of equitable mortgage. On G.'s death intestate the question arose between his real and personal representatives whether the above-mentioned three charges of 9800*l.*, 5411*l.*, and 5000*l.* or any of them had merged in the fee :—

*Held* that, as M. was entitled under his memorandum of deposit to call for a legal mortgage of the fee and also the term, the charge of 9800*l.* and the term securing it had not merged in the inheritance, but remained part of G.'s personal estate.

But *held*, following *Tyler v. Lake*, (1831) 4 Sim. 351, that the charges of 5411*l.* and 5000*l.* had merged in the fee, for that it would be a fraud on M. to keep them alive against him in favour of G., his mortgagor.

In 1872 A. became bankrupt. In 1873 G., under the power of sale in D.'s mortgage of 1870, sold part of the mortgaged property to H.

Upon G. becoming possessed in 1874 of D.'s equity of redemption in the mortgaged property, he took out administration to D., who had died in 1872, and as D.'s administrator sought to prove in A.'s bankruptcy for the unsecured balance of the mortgage debt under the mortgage of 1866. This involved reopening the foreclosure of 1868, and for this purpose G. obtained from H. on December 30, 1875, a reconveyance of the property sold to him in 1873. This reconveyance contained a declaration by G. to bar dower. Subsequently the foreclosure was reopened, and A.'s trustee in bankruptcy declined

**ADMINISTRATION**—*continued.*

to redeem the mortgage of 1866 and conveyed the equity of redemption thereunder to G. :—

*Held*, that the declaration to bar dower operated to bar any right of G.'s widow to dower as regards the property comprised in the deed of December 30, 1875.

Where the owner of an equity of redemption takes a transfer of an existing mortgage with a declaration that the mortgage is kept on foot as a subsisting charge for the benefit of himself, his heirs and assigns, the mortgage will pass upon his death intestate as personal estate to his next of kin. The result is the same where in a conveyance on sale by a mortgagor and mortgagee the mortgage is conveyed separately with a declaration that the mortgage is to be deemed to be a subsisting charge as a protection to the owner of the equity of redemption, his heirs and assigns, against subsequent incumbrances, but for no other purpose.

A recital in a deed may operate as a sufficient declaration against dower under s. 6 of the Dower Act, 1833. *In re GIBBON. MOORE v. GIBBON* — — — — **Neville J. 367**

**2. — Specific Legacy — Interval between Death of Testator and Assent of Executor—Cost of Upkeep and Preservation—Incidence.**

The expense incurred in the upkeep and preservation of specifically bequeathed property between the death of the testator and the assent of his executors to the bequest is payable by the specific legatee, and not out of the general estate of the testator. *In re PEARCE. CRUTCHLEY v. WELLS* — — — — **Eve J. 819**

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**ANNUITY** — Will — Annuities — Direction to pay out of Income—Indefinite Period—Absolute Gift of Corpus "subject to the aforesaid Annuities"—Continuing Charge on Income—Will—Construction.

The testator gave the residue of his estate to his brother on trust "to pay out of the income thereof the sums following that is to say" one clear annuity to each of the three defendants for her sole and separate use without power of anticipation, "and subject to the aforesaid annuities" the testator directed his residuary estate to be held upon trust for his said brother absolutely, or if he should die in the testator's lifetime, then "subject to the aforesaid annuities" upon trust for the issue of his said brother living at the testator's death.

The income of the estate had recently proved insufficient for the payment in full of the annuities, which had fallen into arrear :—

*Held*, that "subject to the aforesaid annuities" meant subject to the payment of the annuities, and that the annuities were a continuing charge upon the income of the estate until they were paid in full.

*Booth v. Coulton*, (1870) L. R. 5 Ch. 684, followed.

*In re Boden*, [1907] 1 Ch. 132, and *In re Bigge*, [1907] 1 Ch. 714, distinguished. *In re HOWARTH. HOWARTH v. MAKINSON*

**Joyce J. 485**

**2. — Will—Direction to purchase Annuity—Death of Annuitant before Purchase—Right of Annuitant's Administratrix to Capital Value of Annuity—Interest.**

A testator bequeathed an annuity to his sister for life to commence from his decease and to be paid by equal quarterly payments, and directed his executors to provide for the annuity by purchasing a Government annuity. The testator died on September 21, 1907, and on December 20, 1907, his executors made the first quarterly payment of the annuity. The annuitant died on March 16, 1908, before the Government annuity had been purchased :—

*Held*, that her legal personal representative was entitled to such a sum as would have purchased the annuity on December 20, 1907—that being the date up to which the annuity had been paid—with interest on that sum from that date at the rate of 4 per cent. per annum. *In re BRUNNING. GAMMON v. DALE* **Neville J. 276**

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1. — *Restrictive Covenants*—"Offensive" Trade or Business—*Bill-posting*—*Advertisement Hoarding*—"Building"—*Mandatory Injunction*.

The plan and conditions of sale of a residential estate provided that all the lots should be subject to certain restrictive covenants for the general benefit of the estate, and, amongst others, that the purchasers were not to erect any "building" for manufacturing purposes or "for the carrying on of any noisy, noisome, offensive or dangerous trade or calling." A lessee from one of the purchasers of two lots had erected along the boundary of the land where it adjoined the plaintiff's plot a hoarding of a permanent nature, 156 ft. long and 15 ft. high, and covered the hoarding with advertisements. On an action by the plaintiff for a mandatory injunction for the removal of this hoarding:—

*Held* by Cozens-Hardy M.R. and Buckley L.J. (affirming the decision of Neville J.), that this hoarding was, within the meaning of the above covenant, a "building" upon which

**BUILDING ESTATE**—*continued.*

the trade of bill-posting was carried on, and that this was an "offensive" trade to the owners of the adjoining plots, and, consequently, that the plaintiff was entitled to a mandatory injunction.

But *held* per Fletcher Moulton L.J., that "offensive" meant something ejusdem generis with "noisy, noisome and dangerous," i.e., some trade the carrying on of which physically interfered with the comfort of a neighbour, and that the hoarding was not a "building" within the covenant. **NUSSEY v. PROVINCIAL BILL POSTING COMPANY AND EDDISON** - - - **C. A. 734**

**BURIAL**—*Disused Burial Ground—Letting of unused and unconsecrated Land—Application of Rents—Parish—Vestry—Borough Council—Transfer of Powers and Property—Exception of Ecclesiastical Powers and Property—Costs—Burial Act, 1857 (20 & 21 Vict. c. 81), s. 24—London Government Act, 1899 (62 & 63 Vict. c. 14), ss. 4, 23.*

In 1757 the vestry of St. George, Hanover Square, bought land for the purpose of a burial ground, the purchase-money being provided out of ecclesiastical funds. By a private Act of Parliament this land was vested in the rector and churchwardens of the parish for the use of the inhabitants of the parish as a burial ground. The rector and his successors were to take the burial fees. Part of the land was consecrated in 1765 and 1818 and used as a burial ground and a site for a chapel; the rest remained unconsecrated. In 1767 and 1768 the rector and churchwardens, acting under the direction of the vestry, granted building leases for ninety-nine years of the unconsecrated land. The ground rents were received by the churchwardens and accounted for by them as part of the revenues of the church. In 1854 the burial ground was closed by an Order in Council pursuant to the Burial Act, 1852, and a burial board was constituted for the parish with a new burial ground. From 1854 to 1865 the ground rents were paid to the burial board. The building leases then fell in, and the rector and churchwardens, acting under the direction of the vestry, renewed the leases for twenty-one years at increased rents, and from that time the rents were collected by the vestry clerk, paid to the management account of the vestry, and applied as part of the ordinary revenues of the parish. In 1900 the buildings were pulled down and fresh building leases were granted. The council of the city of Westminster claimed to be entitled to administer the income of the property for the benefit of the parish.

By s. 24 of the Burial Act, 1857, power to let and sell the unconsecrated parts of disused burial grounds was given to the trustees thereof, and the net moneys received by them were to be applied in discharge of incumbrances, and the residue, where the land was held in trust for the parish, for the benefit of the parish as the vestry should direct.

By s. 4 of the London Government Act, 1899, the powers and property of vestries were transferred to borough councils, but by s. 23 powers relating to the affairs of the church and interests in church property were excepted:—

**BURIAL**—*continued.*

*Held* (Buckley L.J. dissenting), that s. 24 of the Burial Act, 1857, empowered the vestry to apply the net rents of the houses for the benefit of the parish in any way they might think fit, whether secular or ecclesiastical, and that the power thereby conferred was not a power relating to the affairs of the church within the exception in the London Government Act, 1899, and consequently passed to the plaintiffs.

Decision of Warrington J., [1908] 2 Ch. 600, affirmed.

Costs of unsuccessful appellants allowed out of the trust estate in the special circumstances of the case. **WESTMINSTER CORPORATION v. RECTOR AND CHURCHWARDENS OF ST. GEORGE, HANOVER SQUARE** - - - **C. A. 592**

**CAPITAL MONEY**—Settled land.

*See under SETTLED LAND.*

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— *Allen v. Allen* - - (1862) 30 Beav. 395, 403  
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— *Ann, In re* - - - [1894] 1 Ch. 549  
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[1909] 1 Ch. 1

— *Automatic Self-Cleansing Filter Syndicate Co. v. Cuninghame*, [1906] 2 Ch. 34.

Distinguished by Neville J. **MARSHALL'S VALVE GEAR COMPANY v. MANNING, WARDLE & Co.**  
[1909] 1 Ch. 267

Principle of, applied by C. A. **SALMON v. QUIN & AXTENS, LIMITED**  
[1909] 1 Ch. 311

— *Baily & Co. v. Clark, Son, & Morland*,  
[1902] 1 Ch. 649.

Followed by Eve J. **WHITMORES (EDENBRIDGE), LIMITED v. STANFORD**  
[1909] 1 Ch. 427

— *Bayley-Worthington and Cohen's Contract, In re*, [1908] 1 Ch. 26; [1908] A. C. 97.  
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— *Bevan v. Webb* - - - [1901] 2 Ch. 59  
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[1909] 1 Ch. 561

— *Bigge, In re* - - - [1907] 1 Ch. 714  
Distinguished by Joyce J. *In re*  
**HOWARTH** - - - [1909] 1 Ch. 485

— *Boddington v. Woodley*, (1842) 5 Beav. 555  
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— *Boden, In re* - - - [1907] 1 Ch. 132  
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- *Booth v. Coulton* (1870) L. R. 5 Ch. 684  
Followed by Joyce J. *In re HOWARTH*  
[1909] 1 Ch. 485
- *Browne, In re* — — [1894] 3 Ch. 412  
Discussed and applied by C. A. *In re*  
SPURLING — — [1909] 1 Ch. 199
- *Bullock v. Downes* (1860) 9 H. L. C. 1  
Rule of construction established by,  
considered by Neville J. *In re NIGHT-*  
*INGALE* — — [1909] 1 Ch. 385
- *Burrows v. Lang* — — [1901] 2 Ch. 502  
Distinguished by Eve J. WHITMORES  
(EDENBRIDGE), LIMITED *v. STANFORD*  
[1909] 1 Ch. 427
- *Butterknowle Colliery Co. v. Bishop Auck-*  
*land Industrial Co-operative Co.*, [1906]  
A. C. 305.  
Distinguished by C. A. BUTTERLEY  
COMPANY *v. NEW HUCKNALL COL-*  
*LIERY COMPANY* — [1909] 1 Ch. 37
- *Butterley Co. v. New Hucknall Colliery Co.*,  
[1908] 2 Ch. 475.  
Reversed by C. A. — [1909] 1 Ch. 37
- *Cardiff Corporation v. Cardiff Waterworks*  
*Co.*, (1859) 5 Jur. (N.S.) 953; 4 De G.  
& J. 596.  
Applied by Swinfen Eady J. MAR-  
RIOTT *v. EAST GRINSTEAD GAS AND*  
*WATER COMPANY* — [1909] 1 Ch. 70
- *Chapman v. Michaelson* [1908] 2 Ch. 612  
Affirmed by C. A. — [1909] 1 Ch. 238
- *Chester Waterworks Co. v. Chester Union*,  
(1907) 96 L. T. 566; (1908) 98 L. T. 701.  
Discussed and followed by Eve J.  
FREDERICK *v. BOGNOR WATER COM-*  
*PANY* — — — [1909] 1 Ch. 149
- *Church Army, In re*, [1906] W. N. 73; 94  
L. T. 559.  
Followed by Joyce J. *In re WESLEYAN*  
*METHODIST CHAPEL IN SOUTH*  
*STREET, WANDSWORTH*  
[1909] 1 Ch. 454
- *Clergy Orphan Corporation, In re*, [1894]  
3 Ch. 145.  
Followed by Joyce J. *In re WESLEYAN*  
*METHODIST CHAPEL IN SOUTH*  
*STREET, WANDSWORTH*  
[1909] 1 Ch. 454
- *Coles v. Coles* — — [1901] 1 Ch. 711  
Distinguished by Swinfen Eady J. *In*  
*re ELLIS'S SETTLEMENT*  
[1909] 1 Ch. 618
- *Cope, In re* — — — [1908] 2 Ch. 1  
Distinguished by Joyce J. *In re*  
METCALFE — — [1909] 1 Ch. 424
- *Cotton's Trustees and London School Board,*  
*In re*, (1882) 19 Ch. D. 624.  
Discussed and applied by Swinfen  
Eady J. *In re HORSNAILL*  
[1909] 1 Ch. 631
- *Crichton's Oil Co., In re*, [1901] 2 Ch. 184;  
[1902] 2 Ch. 86.  
Distinguished by Swinfen Eady J. *In*  
*re W. J. HALL & Co.*  
[1909] 1 Ch. 521

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- *Crook v. Hill* — — (1876) 3 Ch. D. 773  
Referred to by C. A. EBBERN *v.*  
FOWLER — — [1909] 1 Ch. 578
- *Davies v. Gas Light and Coke Co.*, [1909]  
1 Ch. 248.  
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- *Davis v. Foreman* — — [1894] 3 Ch. 654  
Followed by Eve J. KIRCHNER & CO.  
*v. GRUBAN* — — [1909] 1 Ch. 413
- *Dixon, In re* — — [1902] 1 Ch. 248  
Followed by C. A. *In re HADLEY*  
[1909] 1 Ch. 20
- *Dodson, In re* — — [1907] 1 Ch. 284  
Overruled on one point by C. A. *In re*  
HADLEY — — [1909] 1 Ch. 20
- *Doe v. Summersett*, (1830) 1 B. & Ad. 135  
Distinguished by Warrington J. *In re*  
VIOLA'S INDENTURE OF LEASE  
[1909] 1 Ch. 244
- *Doe v. Woodbridge*, (1829) 9 B. & C. 376  
Followed by Eve J. POWELL *v.*  
HEMSLEY — — [1909] 1 Ch. 680
- *Dunsany's Settlement, In re*, [1906] 1 Ch.  
578.  
Applied by Eve J. *In re PEARSE'S*  
*SETTLEMENT* — — [1909] 1 Ch. 304
- *Elementary Education Acts*, 1870 and 1873,  
*In re*, [1908] 2 Ch. 503.  
Affirmed by C. A. — [1909] 1 Ch. 55
- *Elliott v. Dearsley*, (1880) 16 Ch. D. 322  
Applied by Swinfen Eady J. *In re*  
BALLS — — — [1909] 1 Ch. 791
- *Farquhar v. Newbury Rural Council*,  
[1908] 2 Ch. 586.  
Affirmed by C. A. — [1909] 1 Ch. 12
- *Fearnside's, In re* — — [1903] 1 Ch. 250  
Followed by C. A. *In re HADLEY*  
[1909] 1 Ch. 20
- *Gas Light and Coke Co. v. South Metro-*  
*politan Gas Co.*, (1889) 62 L. T. 126.  
Applied by Neville J. ATTORNEY-  
GENERAL *v. WEST GLOUCESTERSHIRE*  
*WATER COMPANY* — [1909] 1 Ch. 636
- *Glasgow (Lord Provost and Magistrates of)*  
*v. Farie*, (1888) 13 App. Cas. 657.  
Distinguished by C. A. GREAT WEST-  
ERN RAILWAY COMPANY *v. CARPALLA*  
*UNITED CHINA CLAY COMPANY*  
[1909] 1 Ch. 218
- *Goodson v. Richardson*, (1874) L. R. 9 Ch.  
221.  
Applied by Swinfen Eady J. MARRIOTT  
*v. EAST GRINSTEAD GAS AND WATER*  
*COMPANY* — — [1909] 1 Ch. 70
- *Grainger, In re*, [1900] 2 Ch. 756, 767;  
[1902] A. C. 1.  
Applied by Swinfen Eady J. *In re*  
BALLS — — — [1909] 1 Ch. 791
- *Greville v. Browne*, (1859) 7 H. L. C. 689  
Applied by Swinfen Eady J. *In re*  
BALLS — — — [1909] 1 Ch. 791
- *Hall v. Ewin* — — (1887) 37 Ch. D. 74  
Applied by Eve J. POWELL *v. HEMS-*  
*LEY* — — — [1909] 1 Ch. 680



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- *Handsworth District Council v. Derrington*,  
[1897] 2 Ch. 438, 449.  
Distinguished on one point by Neville J.  
STOURBRIDGE URBAN COUNCIL v.  
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- *Hill v. Crook* - (1873) L. R. 6 H. L. 265  
Referred to by C. A. EBBERN v.  
FOWLER - - [1909] 1 Ch. 578
- *Holland v. Dickson* (1888) 37 Ch. D. 669  
Applied by Warrington J. DAVIES v.  
GAS LIGHT AND COKE COMPANY  
[1909] 1 Ch. 248
- *Horne's Settled Estate, In re*, (1888) 39  
Ch. D. 84.  
Applied by Swinfen Eady J. *In re*  
GOODALL'S SETTLEMENT  
[1909] 1 Ch. 440
- *Hunloke's Settled Estates, In re*, [1902] 1  
Ch. 941.  
Distinguished by Parker J. *In re*  
RODES - - - [1909] 1 Ch. 815
- *Hyde Corporation v. Bank of England*,  
(1882) 21 Ch. D. 176.  
Followed by Swinfen Eady J. *In re*  
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COUNCIL - - [1909] 1 Ch. 500
- *Ingleby and Boak and Norwich Union*  
*Insurance Co., In re*, (1883) 13 L. R. Ir.  
326.  
Followed by Parker J. *In re* CRUNDEN  
AND MEUX'S CONTRACT  
[1909] 1 Ch. 690
- *Johnson's Patent, In re* - [1908] 2 Ch. 487  
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[1909] 1 Ch. 114
- *Kempster, In re* - [1906] 1 Ch. 446, 449  
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BALLS - - - [1909] 1 Ch. 791
- *Kydd v. Liverpool Watch Committee*, (1908)  
24 Times L. R. 257.  
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- *Lambert, In re* - - [1908] 2 Ch. 117  
Followed by Joyce J. *In re* METCALFE  
[1909] 1 Ch. 424
- *Lantsbery v. Collier* - (1856) 2 K. & J. 709  
Discussed and applied by Swinfen  
Eady J. *In re* HORSNAILL  
[1909] 1 Ch. 631
- *Liverpool and North Wales Steamship Co. v.*  
*Mersey Trading Co.*, [1908] 2 Ch. 460.  
Affirmed by C. A. - [1909] 1 Ch. 209
- *Liverpool Corporation v. Chorley Water-*  
*works Co.*, (1852) 2 D. M. & G. 852, 860.  
Applied by Swinfen Eady J. MARRIOTT  
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COMPANY - - [1909] 1 Ch. 70
- *Lodge v. National Union Investment Co.*,  
[1907] 1 Ch. 300.  
Distinguished by C. A. CHAPMAN v.  
MICHAELSON - - [1909] 1 Ch. 238

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- *Loring v. Thomas* - (1861) 1 Dr. & Sm. 497  
Followed by Joyce J. *In re* METCALFE  
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- *Maddock, In re* - - [1901] 2 Ch. 372  
Overruled on one point by C. A. *In re*  
HADLEY - - - [1909] 1 Ch. 20
- *Marshall v. Smith* - - (1865) 5 Giff. 37  
Overruled on one point by C. A.  
WILLIAMS v. THOMAS  
[1909] 1 Ch. 713
- *Moore, In re* - - [1901] 1 Ch. 691  
Followed by C. A. *In re* HADLEY  
[1909] 1 Ch. 20
- *Mutter v. Eastern and Midlands Ry. Co.*,  
(1888) 38 Ch. D. 92.  
Applied by Warrington J. DAVIES v.  
GAS LIGHT AND COKE COMPANY  
[1909] 1 Ch. 248
- *Orlebar, In re* - - [1908] 1 Ch. 136  
Followed by C. A. *In re* HADLEY  
[1909] 1 Ch. 20
- *Osborne to Rowlett* (1880) 13 Ch. D. 774  
Doubted by Parker J. *In re* CRUNDEN  
AND MEUX'S CONTRACT  
[1909] 1 Ch. 690
- *Pixton and Tong's Contract, In re*, [1897]  
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Distinguished by Parker J. *In re*  
CRUNDEN AND MEUX'S CONTRACT  
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- *Portal and Lamb, In re*, (1885) 30 Ch. D.  
50.  
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GILLINS - - - [1909] 1 Ch. 345
- *Power, In re* - - [1901] 2 Ch. 659  
Overruled on one point by C. A. *In re*  
HADLEY - - - [1909] 1 Ch. 20
- *Ramsay v. Shelmerdine*, (1865) L. R. 1 Eq.  
129.  
Not followed by Neville J. *In re*  
DUNSTER - - - [1909] 1 Ch. 103
- *Rosenberg v. Northumberland Building*  
*Society*, (1889) 22 Q. B. D. 373.  
Distinguished by C. A. OSBORNE v.  
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- *Rylands v. Fletcher*, (1868) L. R. 3 H. L.  
330.  
Rule in, considered by Eve J. WHIT-  
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- *Scottish Economic Life Assurance Society,*  
*Ex parte*, (1890) 45 Ch. D. 220.  
Distinguished by Warrington J. *In re*  
POPULAR LIFE ASSURANCE COMPANY  
[1909] 1 Ch. 80
- *Shaw, In re* - - - [1894] 2 Ch. 573  
Overruled by C. A. EBBERN v.  
FOWLER - - - [1909] 1 Ch. 578
- *Spencer's Case*, (1582) 5 Rep. 16 b; 1 Sm.  
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Applied by Neville J. RICKETTS v.  
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- *Steele v. South Wales Miners' Federation*, [1907] 1 K. B. 361.  
Overruled on one point by C. A. *OSBORNE v. AMALGAMATED SOCIETY OF RAILWAY SERVANTS* [1909] 1 Ch. 163
- *Stephens, In re* — (1889) 43 Ch. D. 39  
Applied by Swinfen Eady J. *In re* BALLS — — [1909] 1 Ch. 791
- *Sudeley (Lord) and Baines & Co., In re*, [1894] 1 Ch. 334.  
Discussed and applied by Swinfen Eady J. *In re* HORSNAILL [1909] 1 Ch. 631
- *Tait v. Swinstead* — (1859) 26 Beav. 525  
Discussed and applied by Swinfen Eady J. *In re* HORSNAILL [1909] 1 Ch. 631
- *Treasure, In re* — — [1900] 2 Ch. 648  
Overruled on one point by C. A. *In re* HADLEY — — [1909] 1 Ch. 20
- *Trower v. Knightley* (1821) 6 Madd. 134  
Discussed and applied by Swinfen Eady J. *In re* HORSNAILL [1909] 1 Ch. 631
- *Tweddle and Miles, In re*, (1884) 27 Ch. D. 315.  
Discussed and applied by Swinfen Eady J. *In re* HORSNAILL [1909] 1 Ch. 631
- *Tyler v. Lake* — — (1831) 4 Sim. 351  
Followed by Neville J. *In re* GIBBON [1909] 1 Ch. 367
- *Westminster Corporation v. St. George, Hanover Square (Rector and Churchwardens)*, [1908] 2 Ch. 600.  
Affirmed by C. A. — [1909] 1 Ch. 592
- *Winter's Case* — (1572) 3 Dyer, 308 b  
Followed by Eve J. PIGGOTT v. MIDDLESEX COUNTY COUNCIL [1909] 1 Ch. 134
- *Young and Harston's Contract, In re*, (1885) 31 Ch. D. 168, 174.  
Discussed by Parker J. *In re* BAYLEY-WORTHINGTON AND COHEN'S CONTRACT — — — [1909] 1 Ch. 648

**CHAPEL**—Wesleyan Methodist chapel—Model deed—Power of sale—Consent of Charity Commissioners — — 454  
*See* LAND REGISTRY.

**CHARGE OF DEBTS AND LEGACIES**—Will—Construction — — — 787, 791  
*See* WILL. 3, 8.

**CHARITY**—Land taken by Local Authority under Compulsory Powers—Payment of Purchase-money into Court—Scheme for Administration of Charity—Transfer of Money in Court to Official Trustees of Charitable Funds—Costs of Application for Scheme—Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 80.

Where a local authority in pursuance of the compulsory powers conferred upon them by the

**CHARITY**—*continued.*

Lands Clauses Consolidation Act, 1845, take land belonging to a charity, and as a direct result of the taking of such land the trustees of the charity apply to the Charity Commissioners for a new scheme for the regulation of the charity, the costs of the trustees so incurred fall within s. 80 of the Act and are payable by the local authority. *In re* WOOD GREEN GOSPEL HALL CHARITY; *Ex parte* MIDDLESEX COUNTY COUNCIL

Warrington J. 263

2. — *Religion, Advancement of*—Charitable Bequest—Uncertainty—Trust vested in Ecclesiastical Officer for time being—"Charitable religious or other objects in connection with the Roman Catholic Faith."

A residuary bequest in trust for the Roman Catholic Archbishop of Westminster for the time being, to be distributed by him between such charitable, religious, or other societies, institutions, persons, or objects in connection with the Roman Catholic faith in England as he shall in his absolute discretion think fit:—

Held not a good charitable bequest, but void for uncertainty. *In re* DAVIDSON. MINTY v. BOURNE — — — — C. A. 567

— Friendly society—Objects exhausted—Surplus or unexhausted funds—Cypres—Crown—Bona vacantia — — 510  
*See* FRIENDLY SOCIETY.

— Wesleyan Methodist chapel—Model deed—Power of sale—Proceeds applicable as income — — — — 454  
*See* LAND REGISTRY.

**CHILD.** *See* under INFANT.

**CHILD-BEARING**—Mother past child-bearing—Will—Illegitimate children—Class gift  
*See* WILL. 5. 796

**CHINA CLAY**—Mines and "other minerals"—Railway company—Compulsory purchase of surface—Right to support 218  
*See* MINES. 1.

**CHURCHWAY**—Highway—Public user—Diversions—Limited dedication—Settled land  
*See* HIGHWAY. 12

**CLASS**—Illegitimate child—Class gift—After-born children—Child en ventre sa mère at date of settlement — — — 578  
*See* SETTLEMENT. 4.

— Illegitimate children—Class gift—Mother past child-bearing — — — 796  
*See* WILL. 5.

— Inquiry — Costs — Residue — "Otherwise direct" — — — — 810  
*See* WILL. 2.

— Joint tenancy or tenancy in common—Will—Construction — — — — 385  
*See* WILL. 6.

— Will—Class gift—Revocation by codicil—Intestacy — — — — 103  
*See* WILL. 1.

**CLASS**—*continued.*

— Words of futurity—Gift to nephews and nieces—Substitutionary gift—Will—Construction — — — — 424  
See WILL. 12.

**CLAY**—China clay—Mines and “other minerals”  
— Railway company—Compulsory purchase of surface—Right to support  
See MINES. 1. 218

**COAL.** See under MINES.

**CODICIL**—Will—Class gift—Revocation by codicil—Intestacy — — — 103  
See WILL. 1.

**COMPANY**—*Allotment*—“*The Prospectus*”—*Minimum Subscription not stated*—*More than one Prospectus*—*Application for Shares*—*Voidability*—*Companies Act, 1900* (63 & 64 Vict. c. 48), s. 4, sub-ss. 1, 4; s. 5.

The expression “the prospectus” in s. 4, sub-ss. 1, 4, of the Companies Act, 1900, means that document offering capital to the public upon the basis of which the applicant has actually subscribed.

The statement of the minimum subscription on which the directors may go to allotment, which the section requires to be inserted in the prospectus, must be an express statement, and not one which can be implied from other statements in the prospectus. *ROUSSELL v. BURNHAM*  
Parker J. 127

2. — *Book*—*Shareholders' Address Book*—*Right of Shareholder to Copy*—*Action to enforce Right*—*Mandatory Order*—*Motives*—*Companies Clauses Consolidation Act, 1845* (8 & 9 Vict. c. 16), s. 10.

The right given to a shareholder by s. 10 of the Companies Clauses Consolidation Act, 1845, to have a copy of the shareholders' address book is a private right conferred on him as a member of the company and not as a member of the public. The appropriate remedy, therefore, for enforcing this right is either an injunction to restrain the company from refusing to supply or a mandatory injunction directing the company to supply him with the copy required. In granting this relief there is no jurisdiction to inquire into the motives of the applicant.

There is no distinction in principle between granting an injunction to restrain a company from interfering with a right and granting an affirmative order compelling a company to grant the right.

Decision of Warrington J., [1909] 1 Ch. 248, affirmed. *DAVIES v. GAS LIGHT AND COKE COMPANY* — — — — C. A. 708

3. — *Director holding Majority of Votes*—*Action in Name of Company*—*Majority of Co-directors opposing*—*Motion to strike out Name of Company as Plaintiff*—*Costs*—*Companies Act, 1862* (25 & 26 Vict. c. 89), *Sched. I, Table A*, art. 55.

The M. Company was incorporated under the Companies Acts and acquired and worked a patent. The powers of its directors were governed by art. 55 in Sched. I. to the Com-

**COMPANY**—*continued.*

panies Act, 1862, which provides “the business of the company shall be managed by the directors, who may . . . exercise all such powers of the company as are not by the foregoing Act, or by these articles, required to be exercised by the company in general meeting, subject nevertheless to any regulations of these articles, to the provisions of the foregoing Act, and to such regulations being not inconsistent with the aforesaid regulations or provisions, as may be prescribed by the company in general meeting.” A. and three other persons were the four directors of the company and between them held substantially the whole of the subscribed share capital of the company. A. held a majority, but not a three-fourths majority, of the shares and votes. Disputes arose at the board between A. and the other three directors, who were interested in a patent vested in the N. Company, which, so A. was advised, infringed the M. Company's patent and was admittedly a competing patent. The three directors bona fide declining to sanction any proceedings against the N. Company, A. commenced an action against the N. Company in the name of the M. Company to restrain the alleged infringement. Thereupon the three directors moved in the name and on behalf of the M. Company to strike out the name of that company as plaintiff and to dismiss the action on the ground that the name of the M. Company had been used without authority:—

*Held*, on the construction of art. 55, that the majority of the shareholders had the right to control the action of the directors in the matter and that the motion must be dismissed with costs as between solicitor and client to be paid by the solicitors who had launched it.

*Automatic Self-Cleansing Filter Syndicate Co. v. Cuninghame*, [1906] 2 Ch. 34, distinguished. *MARSHALL'S VALVE GEAR COMPANY v. MANNING, WARDLE & Co.* — *Neville J.* 267

4. — *Directors*—*Powers*—*Articles of Association*—*Construction*—*Vesting of Management in Directors*—*Control of Management by Company in General Meeting.*

By the articles of association of a company the general management of the business of the company was vested in the directors subject to such regulations (being not inconsistent with the provisions of the articles) as might be prescribed by the company in general meeting, and it was provided that no resolution of a meeting of the directors having for its object (among other things) the acquisition or letting of any premises should be valid unless twenty-four hours' notice of the meeting should have been given to each of the managing directors A. and B. and neither of them should have dissented therefrom in writing before or at the meeting. A. and B. held the bulk of the ordinary shares in the company. Resolutions were passed by the directors for the acquisition of certain premises and for the letting of certain other premises, but B. dissented from each of these resolutions in accordance with the articles. At an extraordinary general meeting of the company resolutions to the same effect were passed by a simple majority of the shareholders:—

**COMPANY—continued.**

*Held*, applying the principle of *Automatic Self-Cleaning Filter Syndicate Co. v. Cuninghame*, [1906] 2 Ch. 34, that the resolutions of the company were inconsistent with the provisions of the articles and that the company ought to be restrained from acting upon them. *SALMON v. QUIN & AXTENS, LIMITED* - - - **C. A. 311**

**5. — Income Bond—Construction—Bonus payable out of Profits—No Profits earned—Issue of paid-up Shares in exchange for Bonus—Dividends out of Capital—Issue of Shares at a Discount—Want of Consideration—Ultra vires.**

In October, 1904, a company raised 50,000*l.* by 5000 10*l.* income bonds, repayable in seven years with a bonus of 25*l.* exclusively out of the net profits from time to time of the company. By the conditions the registered holders of these bonds might exchange them for first mortgage debentures, but this was not to affect the bonus; by another condition the company had the option at any time after December, 1906, of giving notice to pay off the bonds, and six months afterwards the principal (if not converted) and the bonus were to become payable. In 1909 most of the bonus had been converted into debentures, leaving only the 25*l.* bonus payable; no profits had been earned, but it was proposed to extinguish this 25*l.* by the issue, in exchange for the bonus, of twenty fully paid up new shares of the nominal value of 1*l.* each. An action having been brought to test the validity of this proposed issue of further capital:—

*Held* (reversing the decision of Parker J.), that there was nothing in the bond which authorized the company to turn a contingent liability on income into a present liability payable out of capital; that the proposed arrangement with the bondholders was equivalent to a payment of dividends out of capital and provided a means of issuing shares at a discount, for there was no consideration given to the company for the issue of these new shares; and that on these grounds the arrangement was ultra vires the company and must be restrained. *BURY v. FAMATINA DEVELOPMENT CORPORATION, LIMITED* - - - - **C. A. 754**

**6. — Voluntary Winding-up—Amalgamation and Reconstruction—Unfair Scheme—Dissentient Minority—No Agreement executed—Contributory's Petition impeaching Scheme—Compulsory Order—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 161.**

Where a scheme for the voluntary winding up and amalgamation of company A and company B by sale and transfer of their assets to a new company under s. 161 of the Companies Act, 1862, is eminently unfair to the independent minority of company A, and is only passed as regards company A by means of a large majority of shares held by company B, which alone is benefited by the scheme, then, if no agreement for the sale to the new company has been actually executed, the Court will at the instance of the minority of company A stop the scheme by making a compulsory order to wind up that company, and will not leave that minority to their remedy of being paid out as dissentient

**COMPANY—continued.**

members under s. 161. *In re CONSOLIDATED SOUTH RAND MINES DEEP, LIMITED*

**Swinfen Eady J. 491**

**7. — Winding-up—Petition—Creditor—Debenture Stockholder—Unpaid Interest—Companies Act, 1862 (25 & 26 Vict. c. 89), s. 82.**

A trust deed for securing debenture stock, made between the company and the trustees for the stockholders, provided that the company would pay the half-yearly interest direct to the stockholders, whose receipt should be a good discharge to the trustees and the company. The certificate delivered to each stockholder stated the rate of interest and dates of payment, and certified that the stockholder was the registered holder of the stock which "is issued subject to the provisions contained" in the trust deed, but it did not contain any direct covenant with the stockholder to pay him the interest:—

*Held*, that stockholders whose interest was in arrear were not entitled to present a winding-up petition as creditors under s. 82 of the Companies Act, 1862. *In re DUNDERLAND IRON ORE COMPANY, LIMITED* - **Swinfen Eady J. 446**

**8. — Winding-up—Surplus Assets—Accumulated Profits—Capital—Arrears of Preferential Dividends—Direction to pay out of Surplus Assets—No Dividends declared—To what extent Arrears payable.**

A company's capital consisted of 5 per cent. cumulative preference shares and ordinary shares, the preference shares having priority both as to capital and dividend, and the preferential dividend being payable before any profits could be carried to reserve.

The articles provided that no dividend should be payable except out of profits, and that, in the event of the company being wound up, the surplus divisible assets for the time being remaining "after paying the liabilities of the company" should be applied first in repaying the preference capital and "secondly in paying the arrears (if any) of the five per cent. preferential dividends thereon to the commencement of the winding-up." The remainder of the surplus assets was to belong to the ordinary shareholders.

No dividends were ever declared, but the profits were accumulated until the company was wound up:—

*Held*, that the preference shareholders were entitled to their arrears of preferential dividends, though not declared, but only to the extent of the accumulated profits.

*In re Crichton's Oil Co.*, [1901] 2 Ch. 184; [1902] 2 Ch. 86, distinguished. *In re W. J. HALL & Co., LIMITED* - **Swinfen Eady J. 521**

— Navigation company—Prescriptive claim to take surplus water only—User unlimited - - - - **775**  
*See* **PRESCRIPTION.**

— Solicitor—Lien on documents—Winding-up—Liquidator—Documents in solicitor's hands before winding-up order - **96**  
*See* **SOLICITOR. 2**

— Water company.  
*See* under **COMPANY.**



**COMPANY**—*continued*.

— Will—Gift of shares—Change in value of shares—Will speaking from death **345**  
*See* WILL. 4.

**COMPENSATION**—Housing of the working classes.

*See* under HOUSING OF THE WORKING CLASSES.

— Lease—Covenants—Breaches—Re-entry—  
 —Compulsory purchase by public body  
 —Lands Clauses Acts — — **134**  
*See* LEASE.

**COMPOSITION**—Bankruptcy.

*See* under BANKRUPTCY.

**CONDITION** — Precedent — Lease — Option to purchase landlord's interest—Mortgage  
 —Specific performance — — **284**  
*See* LANDLORD AND TENANT. 2.

**CONSIDERATION**—*Antecedent Debt—Security—Policy of Assurance—Interests based on Valuable Consideration—Assignment.*

The mere existence of an antecedent debt is not valuable consideration for a security given by the debtor.

H. was entitled to a policy of assurance for 5000*l.* on his own life subject to conditions which made the policy void "if the lives assured died by their own hands . . . but without prejudice to the bona fide interests of third parties based on valuable consideration." He was indebted to W. in sums exceeding 15,000*l.* W. had pressed for payment or reduction of the debt. H. executed a deed of assignment of the policy to W. by way of mortgage to secure all moneys owing to him from H., and delivered the deed duly executed to his solicitors, telling them to use their own discretion whether they should inform W. of the assignment or not. The solicitors obtained time from W. for payment of the debt without producing the deed, and, acting on H.'s instructions, destroyed it. H. shortly afterwards died by his own hand. No notice of the existence of the assignment was given to W. or the insurance society during H.'s life. After his death his estate was being administered in Court, and the fact of the assignment was discovered and communicated to W.'s firm, who had taken in a claim. Notice of the assignment was then given to the insurance society, and the executors of W., who had died, brought this action to recover the policy moneys:—

*Held*, that there was no valuable consideration for the assignment within the saving clause in the policy, and the action therefore failed. *WIGAN v. ENGLISH AND SCOTTISH LAW LIFE ASSURANCE ASSOCIATION* — **Parker J. 291**

— Company—Income bond—Construction  
 —Dividends out of capital—Issue of shares at a discount—Want of consideration — — — **754**  
*See* COMPANY. 5.

— Settlement—Covenant to settle wife's after-acquired property—Construction  
 —Land in Jersey—Consideration for transfer necessary — — — **304**  
*See* SETTLEMENT.

**CONSOLIDATION**—Mortgage in name of trustee  
 —Assignment of equities of redemption to same person — — — **109**  
*See* MORTGAGE. 2.

**CONTRACT**—Vendor and purchaser.

*See* under VENDOR AND PURCHASER.

**CONTRACT OF SERVICE**—*Agreement to refer Disputes to Foreign Tribunal—Agreement not to give Notice before fixed Date—Previous Determination of Service—Dispute—Action for Injunction—Specific Performance—Implied Contract not to divulge—No Cause shown for Injunction—Stay of Proceedings.*

By an agreement in writing dated June 30, 1905, the defendant, a German subject, agreed with the plaintiffs, a Leipzig firm, to act as their representative in the United Kingdom; to devote all his activity and industry exclusively to the sale of their goods; not to divulge any business matters to any one; and under a money penalty to remain in his position and not to give notice before July 1, 1910, to be three months' notice if then given. The parties agreed to submit themselves in all cases of dispute to the exclusive jurisdiction of the Leipzig Courts and to the exclusive applicability of the German law.

After the expiration of three months' previous notice to determine the agreement, the defendant left the plaintiffs' employment on May 1, 1908, and entered the service of a rival English firm. The plaintiffs then issued the writ in this action for injunctions and other relief. The defendant entered a conditional appearance and applied by summons to stay proceedings on the ground that the disputes should be referred to the Leipzig Court. Thereupon the plaintiffs served notice of motion for (1.) an injunction to restrain the defendant from engaging in any other business than theirs until after July 1, 1910, or until a final order by the Leipzig Court; (2.) an injunction restraining him for a similar period from divulging matters relating to the plaintiffs' business.

On the hearing of the summons and motion:—

*Held*—(1.) that prima facie the agreement to refer was binding upon the parties and was one upon which the Court would act unless for some good cause the matter ought to be determined otherwise than by the Leipzig Court.

(2.) That the plaintiffs were not entitled to the first injunction asked, on the ground that the stipulation sought to be enforced, although negative in form, was affirmative in substance, and that the Court would not grant an injunction which in effect would compel specific performance of a contract of service.

*Davis v. Foreman*, [1894] 3 Ch. 654, followed.

(3.) That the plaintiffs were not entitled to the second injunction asked, on the ground that the existence of any implied contract on the part of an employee after the determination of his service not to divulge information acquired during it necessarily involved the construction of the written contract which the Court was precluded from construing by the express agreement of the parties; and

(4.) That, therefore, no cause had been shown



**CONTRACT OF SERVICE—continued.**

why the parties should not be held to their agreement to refer all disputes to the Leipzig Court, and an order must be made on the summons staying proceedings in the action.  
**KIRCHNER & CO. v. GRUBAN - Eve J. 413**

**CONTRIBUTORY**—Company—Voluntary winding-up—Unfair scheme—Contributory's petition impeaching scheme - **491**  
 See COMPANY. 6.

**CONVEYANCING AND LAW OF PROPERTY**—Lease—Covenants—Breaches—Re-entry—Compulsory purchase by public body—Severance of reversion - **134**  
 See LEASE.

— Trustees—Inability of executors of last surviving trustee to execute trust - **690**  
 See TRUSTEE. 1.

— Trustees, Power to appoint new—Tenant for life donee of power - **280**  
 See TRUSTEE. 5.

**COPY**—Shareholders' address book—Right of shareholder to copy—Motives - **708**  
 See COMPANY. 2.

**CORPORATION**—Local education authority—Council of county borough—Corporation acting by council - **500**  
 See EDUCATION.

**COSTS**—*Lands Clauses Act*—*Death of Vendor before Completion*—*Vendor's Will*—*Costs of Probate*—*Taxation of Costs*—*Lands Clauses Consolidation Act, 1845* (8 & 9 Vict. c. 18), s. 82.

An owner of leasehold property entered into a contract under the *Lands Clauses Consolidation Act, 1845*, to sell the same to the London County Council, and died after the title was accepted but before the sale was completed, having bequeathed all his property to his wife and appointed her sole executrix:—

*Held*, that the costs of taking out probate to the vendor's will were not payable by the purchasers under s. 82 of the Act.

Decision of *Joyce J.*, [1908] 2 Ch. 503, affirmed. *In re ELEMENTARY EDUCATION ACTS, 1870 AND 1873* - - - **C. A. 55**

— Burial—London government—Transfer of powers and property—Exception of ecclesiastical powers and property **592**  
 See BURIAL.

— Company—Action in name of company—Majority of co-directors opposing—Motion to strike out name of company as plaintiff - - - **267**  
 See COMPANY. 3.

— *Lands Clauses Acts*—Payment of purchase-money into Court—Scheme for administration of charity—Costs of application for scheme - - - **263**  
 See CHARITY. 1.

— Married woman—Separate estate—General power of appointment—Execution—Elegit - - - **557**  
 See HUSBAND AND WIFE, 1.

**COSTS—continued.**

— Solicitors' costs.

See under SOLICITOR.

— Will—Gift to class—Inquiry—Costs—Residue—"Otherwise direct" - **810**  
 See WILL. 2.

— Will—Specific legacy—Interval between death of testator and assent of executor—Cost of upkeep and preservation **819**  
 See ADMINISTRATION. 2.

**COVENANT**—*Restrictive Covenant*—*Freehold Land—Building—Covenant "for himself his executors administrators and assigns"*—*Meaning of Covenant*—*Plans to be first submitted*—*Negative Character of Covenant*—*Breach by Covenantor's Lessee*—*Determination of Lease*—*Re-entry of Covenantor*—*Liability for Breach by his Assigns*—*Not a continuing Breach*—*Nature and Extent of Covenant*—"Outbuilding"—*Obligation to submit Plans*—*Incidence*.

By a deed of conveyance, dated June 24, 1904, of part of a building estate the defendant, who was the purchaser, covenanted "for himself his executors administrators and assigns" with Ball (the owner of the estate), his heirs and assigns, that he would (inter alia) erect on the land conveyed private residences only (with suitable outbuildings to be erected at the rear thereof), and that he would before the commencement of the erection of any building submit the plans thereof to Ball, his heirs and assigns, for his or their approval. Ball afterwards conveyed Lenton Hall, part of the land retained by him, to Bond in fee simple together with the benefit of the defendant's covenants. The defendant demised his land to lessees subject to the stipulations and conditions in the deed of June 24, 1904, and the lessees entered into covenants with him as to submission of plans and building similar to those in the same deed. The lessees commenced to build a house without having submitted plans to Bond or obtained his approval thereof, and they also erected an outside building, containing a water-closet, built on and attached to the front end of the house and not accessible from the inside of the house. The defendant had seen plans of the house and was cognizant of its erection. Bond took objection that the house was being erected in breach of covenant, and the lessees stopped building. On the subsequent disclaimer of the lease by their trustee in bankruptcy, the defendant re-entered upon the demised land with the unfinished house upon it. In the meantime Bond had conveyed Lenton Hall to the plaintiff in fee simple with the benefit of the defendant's covenants. The plaintiff thereupon commenced this action for (inter alia) an order directing the defendant to pull down and remove the house in question, the plaintiff alleging depreciation in the value of his property from the proximity of the unsightly and unfinished house which was visible from all the principal rooms of Lenton Hall:—

*Held*, (1.) that the covenant to submit plans before the commencement of building involved a negative contract that no buildings should be commenced until plans had been submitted to and approved by the grantor, his heirs and assigns,

**COVENANT**—*continued*.

and that in this respect the erection of the house was a breach of covenant; and (2.) that the water-closet was an outbuilding within the meaning of the covenant, and that its erection was, in the circumstances, a breach of the covenant as to the position of outbuildings; but

*Held*, further, that the defendant was not liable to pull down and remove the house, on the following grounds:—

(1.) That there was no continuing breach, the covenant having been broken once and for all when the house was erected contrary to it: *Doe v. Woodbridge*, (1829) 9 B. & C. 376, followed;

(2.) That the breach was committed, not by the defendant, but by his lessees, and that the defendant had not by his conduct rendered himself liable for the violation of the covenant: *Hall v. Ewin*, (1887) 37 Ch. D. 74, applied; and

(3.) That in the covenant by the defendant the words "for himself his executors administrators and assigns" were used to indicate the intention that the covenants should run with the land, and not to impose on the covenantor liability for the acts of his assigns.

Upon the strict construction of the covenant, the obligation to submit plans for the approval of the covenantee lay on the defendant, notwithstanding the lease, but in any action founded on a breach of that covenant the plaintiff would only be entitled to nominal damages, and not to any such order as was claimed in the action. *POWELL v. HEMSLEY* - - - **Eve J. 680**

— After-acquired property, Covenant to settle — Gift from husband - - - **618**  
See SETTLEMENT. 1.

— After-acquired property, Covenant to settle wife's — Construction — Land in Jersey  
See SETTLEMENT. 2. **304**

— Building estate — Restrictive covenant — Covenant running with the land — "Assign" — Breach - - - **544**  
See LANDLORD AND TENANT.

— Lease — Breaches — Re-entry — Compulsory purchase by public body — Severance of reversion - - - **134**  
See LEASE.

— Restraint of trade — Reasonable protection of covenantee — Newspaper reporter — Unusual stipulation — Infant - - **763**  
See RESTRAINT OF TRADE.

— Restrictive covenant — "Offensive" trade or business — Bill-posting — Advertisement hoarding — "Building" — Mandatory injunction - - - **734**  
See BUILDING ESTATE.

**CREDITOR** — Company — Winding-up — Petition — Debenture stockholder — Unpaid interest - - - **446**  
See COMPANY. 7.

**CRIMINAL LUNATIC** — Necessaries — Past obligation — Debt — Claim by Crown for arrears - - - **574**  
See LUNACY. 1.

**CROWN** — Bona vacantia — Friendly society — Objects exhausted - - - **510**  
See FRIENDLY SOCIETY.

— Criminal lunatic — Necessaries — Past obligation — Debt — Claim by Crown for arrears  
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— Industrial and Provident Societies — Dis-solution — Appointment of new trustee — Vesting order — Bona vacantia - **701**  
See INDUSTRIAL AND PROVIDENT SOCIETIES.

**CROWN LANDS** — Pier — Unauthorized construction — Nuisance — Public right of access — Rates for passengers — Rates for vessels "mooring" - - - **209**  
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**CYPRES** — Friendly society — Objects exhausted — Charity — Resulting trust — Crown — Bona vacantia - - - **510**  
See FRIENDLY SOCIETY.

**DAMAGE AND DAMAGES** — Covenant running with the land — "Assign" — Breach **544**  
See LANDLORD AND TENANT. 1.

— Lease — Covenants — Breaches — Re-entry — Compulsory purchase by public body — Compensation - - - **134**  
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— Watercourse — Artificial channel — Mill stream — Title to bed of stream — Right to flow of water - - - **427**  
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**DEATH** — Costs of probate — Lands Clauses Acts — Death of vendor before completion — Vendor's will - - - **55**  
See COSTS.

— Will — Annuity — Direction to purchase — Death of annuitant before purchase  
See ANNUITY. 2. **276**

— Will speaking from — Gift of shares — Change in value of shares - - **345**  
See WILL. 4.

**DEBENTURE STOCKHOLDER** — Company — Winding-up — Petition — Creditor — Unpaid interest - - - **446**  
See COMPANY. 7.

**DEBTS** — Will — Exoneration — Contrary or other intention — Mortgage debt - - **787**  
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— Will — Mixed fund — Express charge of debts — Period of limitation - **791**  
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**DECLARATORY ORDER** — Mortgage in favour of unregistered money-lender — Validity — Equitable relief — Imposition of terms  
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**DEDICATION** — Highway — Public user — Presumption — Settled land — Churchway — Diversion - - - **12**  
See HIGHWAY.

**DEED OF ASSIGNMENT.**  
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**DEED POLL** — Mistake — Forgetfulness —  
Appointment—Rescission — — 476  
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**DEPOSIT** — Life assurance company—Amalgamation—Dissolution—Repayment of deposit — — — 80  
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Majority of co-directors opposing—  
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**DISSOLUTION** — Industrial and Provident Societies — — — — 701  
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— Life assurance company—Amalgamation—  
Repayment of deposit — — — 80  
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**DISTRIBUTION** — Accelerating period of —  
“Eldest son” — — — — 534  
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**DISTRIBUTIONS, STATUTE OF**—Next of kin—  
Class—Joint tenancy or tenancy in common — — — — 385  
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**DIVERSION**—Highways.  
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**DIVIDENDS**—Company—Income bond—Construction—Dividends out of capital—  
Ultra vires — — — — 754  
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— Lunacy—Receiver—Accrued dividends —  
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Bank of England—Indemnity — 199  
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— Surplus assets — Accumulated profits —  
Capital—Arrears of preferential dividends — — — — 521  
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— Declarations against dower, Effect of 367  
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See under REVENUE.

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— Watercourse.  
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**ECCLESIASTICAL LAW**—Burial.  
See under BURIAL.

— Charitable bequest — Advancement of religion—Uncertainty — — 567  
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**EDUCATION** — *Local Education Authority — Council of County Borough—Corporation acting by Council—Education Act, 1902 (2 Edw. 7, c. 42), s. 1—Education (Administrative Provisions) Act, 1907 (7 Edw. 7, c. 43), s. 1—Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 15.*

In s. 1 of the Education Act, 1902, which enacts that “for the purposes of this Act, the council of every county and of every county borough shall be the local education authority,” and throughout the Act, the words “council of a borough” are used for “the mayor, aldermen, and burgesses acting by the council.” The council were not incorporated as a separate body by that Act. Therefore land which the council have agreed to acquire under the powers and for the purposes of the Education Acts must be conveyed to the mayor, aldermen, and burgesses.

*Hyde Corporation v. Bank of England*, (1882) 21 Ch. D. 476, followed. *In re LEEDS INSTITUTE OF SCIENCE, ART, AND LITERATURE AND LEEDS CITY COUNCIL* — *Swinfen Eady J.* 500

“**ELDEST SON**” — Settlement — — — 534  
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**EXECUTION**—Married woman—Separate estate —  
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**EXECUTOR**—Trustees—Inability of executors of last surviving trustee to execute trust  
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**FOREIGN TRIBUNAL**—Agreement to refer disputes to—Contract of service—Implied contract not to divulge—Injunction—Stay of proceedings - - - 413  
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**FORESHORE**—Pier—Unauthorized construction—Nuisance—Public right of access—Rates for passengers—Rates for vessels “mooring”—Crown grants - 209  
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**FORGETFULNESS**—Mistake—Appointment—Deed poll—Rescission - - 476  
See **POWER OF APPOINTMENT**.

**FRIENDLY SOCIETY**—Objects exhausted—Surplus or unexhausted funds—Charity—Cypres—Resulting Trust—Crown—Bona vacantia.

“The Benefit Society for Girls educated at the School of Industry, Kendal,” was established in 1808, and was registered as a friendly society under the Friendly Societies Act of 1793 (33 Geo. 3, c. 54), s. 2. It consisted of honorary members and benefited members. The honorary members were ladies who gave in their names when the society was formed or were afterwards elected according to the rules and paid a subscription. They could not in any case derive benefit from the funds of the society. The benefited members were girls educated at the School of Industry; they paid weekly contributions to the society from the age of seven to sixty-five, and were entitled to certain weekly payments in sickness varying with age up to sixty-five, and to an annuity of 2s. a week from fifty-six to sixty-five, 2s. 6d. from sixty-five to seventy, and 4s. from seventy for the rest of their lives. All payments by the members and all sick allowances ceased at sixty-five. The annuities became payable automatically on a member attaining fifty-six without any inquiry as to poverty. The rules of the society provided that the contributions of honorary members should be appropriated, one half “to raise a capital the interest of which would be sufficient to pay the allowance to children under fifteen”; the other half “to be under the special direction of honorary members for relief in extraordinary cases not provided by the general fund.

The School of Industry was closed in 1845, and after that date no new members were admitted, but subscriptions continued to be received from both classes of members, sick allowances and annuities were paid, and the balance of the

## FRIENDLY SOCIETY—continued.

funds accumulated. This action was brought by the trustees to decide what was to be done with the accumulations, which amounted to 1901*l.* apportioned to the honorary members' fund and 304*l.* apportioned to the benefited members' fund. The 1901*l.* appeared from the accounts to have arisen wholly from the first half of the honorary members' fund appropriated to provide for the allowances to children under fifteen. The only surviving benefited members were two women over sixty-five in receipt of annuities. Five persons who claimed to be honorary members were made defendants:—

*Held*, that the society was not a charity, for the benefited members had a legal title to the benefits on making the payments without regard to their need; that the contributions of honorary members were absolute gifts to the society, and that there could be no resulting trust in favour of the honorary members; that the annuitants had no interest in the funds of the society other than the annuities which they had purchased; and that therefore the surplus of the benefited members' fund, after providing for the annuities, and the whole of the honorary members' fund belonged to the Crown as bona vacantia.  
**BRAITHWAITE v. ATTORNEY-GENERAL**

**Swinfen Eady J. 510**

**FUTURITY, WORDS OF**—Will—Construction—Class—Gift to nephews and nieces—Niece dead at date of will leaving child - - - 424  
See **WILL**. 12.

**GAS**—“Supply of gas”—“Supply of water”—Supplying water outside statutory limits—Ultra vires—Injunction - - 636  
See **WATER**. 3.

**GLOUCESTERSHIRE (WEST) WATER ACTS**—“Supply of water”—Supplying water outside statutory limits—Injunction  
See **WATER**. 3. 636

**GRANT**—Pier—Unauthorized construction—Rates for passengers—Rates for vessels “mooring”—Foresore—Crown grant  
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**HEIRS**—Trustees—Gift to persons upon trust to sell without adding “and their heirs”—Inability of executors of last surviving trustee to execute trust 690  
See **TRUSTEE**. 1.

**HIGHWAY**—Dedication—Public User—Presumption—Settled Land—Tenancy for Life with Remainder in Fee—Churchway—Diversion—Limited Dedication.

Where land is settled upon a tenant for life with an immediate remainder to a tenant in fee, both of whom are sui juris, it is competent for the tenant for life and remainderman together to dedicate to the public a road over the settled land.

Accordingly, where land was thus settled and was under the control and management of the remainderman, and a new road was laid out by



**HIGHWAY**—*continued.*

him across the land and was treated by him as a public road, and since the date of its construction, more than sixty years ago, the road had been used by the public in such a way as would have compelled the Court as against an owner in fee to infer dedication:—

*Held*, that the Court ought to infer from the facts that there had been a dedication to the public by the tenant for life and remainderman.

A landowner desiring to divert or improve a churchway by laying out a new road in substitution therefor cannot confer on the public such rights only over the new road as existed over the churchway.

Decision of Warrington J., [1908] 2 Ch. 586, affirmed. *FARQUHAR v. NEWBURY RURAL DISTRICT COUNCIL* - - - **C. A. 12**

— Footpath.

See under FOOTPATH.

— Streets.

See under STREETS.

**HOARDING**—Restrictive covenants—Advertisement hoarding—"Building"—Mandatory injunction - - - **734**  
See BUILDING ESTATE.

**HOUSING OF THE WORKING CLASSES**—

*Local Authority—Improvement Scheme—Compulsory Powers—Lands injuriously affected—Business Premises—Easement of Light—Compensation—Evidence of Loss of Trade, Admissibility of—Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), ss. 20, 21, 22, 93; Sched. II., cls. 4, 7, 11.*

Where land is injuriously affected by the carrying into effect of an improvement scheme under the provisions of the Housing of the Working Classes Act, 1890, such as the extinguishment under s. 22 of the Act of an easement appurtenant to premises adjoining but not included in the scheme, the arbitrator, in determining the compensation to be paid to the owner of the easement for the loss sustained by him by reason of the operation of the Act, cannot take into consideration the loss of trade or diminution in value of the goodwill of the business carried on at the premises enjoying the easement. *In re HARVEY AND LONDON COUNTY COUNCIL*  
**Neville J. 528**

**HUSBAND AND WIFE**—*Married Woman—Separate Estate—General Power of Appointment—Costs—Execution—Elegit—Practice—Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 1, sub-s. 2.*

Real property over which a married woman and her husband have a joint general power of appointment by deed cannot be taken in execution under a writ of elegit, issued under an order for payment of costs by the married woman and her husband, by which execution against the married woman is limited to her separate estate. *GOATLEY v. JONES* (No. 1). *GOATLEY v. JONES* (No. 2) - **Neville J. 557**

2. — *Married Woman—Will—Appointment—Exercise of General Power—Separate Estate—"Liable for her debts or other liabilities"*

**HUSBAND AND WIFE**—*continued.*

—*Jewellery—Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 1, sub-ss. 3 & 4; s. 4.*

By a marriage settlement of June 2, 1890, the testatrix on her marriage with Mr. Adamson assigned a reversionary interest to trustees upon trust, after the sum had been received by them, upon her request to raise thereout a sum not exceeding 7000*l.* and pay the same to her for her separate use, but so that she should not have power to alienate or charge her interest in the 7000*l.* during coverture, and then upon trusts under which she took a general power of appointment.

By an indenture of January 29, 1891, in consideration of 10,000*l.* advanced by A. to Mr. Adamson, he covenanted to repay the same and interest, and the testatrix covenanted that when the reversionary interest fell in she would immediately request the trustees to raise and pay to her 4000*l.*, and that she, her executors or administrators, would pay it over to A., or so much thereof as should be required to satisfy the amount then due. Mr. Adamson died, and on her second marriage with Mr. Fieldwick the testatrix executed a new settlement of her reversionary interest upon trusts under which she had a general power of appointment. The reversionary interest fell into possession in 1901. The testatrix by her will exercised her power of appointment and thus made the fund liable for her debts and other liabilities under s. 4 of the Married Women's Property Act, 1882. She died in 1907. Only about 1200*l.* of the 10,000*l.* had been repaid, and A. now claimed to be paid out of the testatrix's estate the 4000*l.* under the covenant contained in the deed of January 29, 1891. It was admitted that owing to the restraint on alienation contained in the first settlement the covenant was inoperative as a charge:—

*Held*, that inasmuch as on the evidence the testatrix had no separate estate, in respect of which she could be supposed to have contracted, at the time when she made the covenant, it did not constitute a contract with respect to her separate property for breach of which an action for damages would lie against her estate.

*In re Ann*, [1894] 1 Ch. 549, overruled. *In re FIELDWICK, JOHNSON v. ADAMSON* - **C. A. 1**

3. — *Practice—Pauper—"Not worth 25*l.*"—Married Woman Plaintiff—52*l.* yearly Income—Restraint on Anticipation—Affidavit of Want of Means—Joinder of Husband—Rules of the Supreme Court, 1883, Order xvi., rr. 22, 24.*

A married woman in receipt of a yearly income of 52*l.* without power of anticipation obtained an *ex parte* order for leave to prosecute in forma pauperis an action in which she was sole plaintiff. Upon the application of the defendants to dispauper her:—

*Held*, that the married woman was not a person "not worth 25*l.*" within the meaning of Order xvi., r. 22, and must be dispaupered.

The principle of *Boddington v. Woodley*, (1842) 5 Beav. 555, and *Kydd v. Liverpool Watch Committee*, (1908) 24 Times L. R. 257, applied.

*Quære* whether the joinder of her husband

**HUSBAND AND WIFE**—*continued.*

in the affidavit of want of means by a married woman seeking to be admitted to sue in forma pauperis is in all cases absolutely necessary. *In re ATKIN'S TRUSTS. SMITH v. ATKIN*

Eve J. 471

— Settlement.

See under SETTLEMENT.

**ILLEGITIMATE CHILDREN** — Class gift — After-born children—Child en ventre sa mère at date of settlement. — 578  
See SETTLEMENT. 4.

— Class gift—Mother past child-bearing 796  
See WILL. 5.

**INDEMNITY** — Lunacy — Receiver — Accrued dividends — Form of order — Transfer into Court—Bank of England — 199  
See LUNACY. 2.

**INDUSTRIAL AND PROVIDENT SOCIETIES**—*Dissolution—Advertisement of Instrument while Assets vested in Society—Appointment of New Trustee — Vesting Order — Crown — Bona vacantia—Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), ss. 58, 61—Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 25, sub-s. 1; s. 26; s. 35, sub-s. 1.*

The property of an incorporated industrial or provident society dissolved by instrument of dissolution under ss. 58 and 61 of the Industrial and Provident Societies Act, 1893, is subject to a trust for appropriation and division (after providing for the claims of creditors) in accordance either with the provisions of the instrument or with the award of the chief registrar. Where dissolution took place before the society had handed over some of its property to the person nominated by the instrument of dissolution to realize its assets, the Court (the Crown not claiming the property as bona vacantia) appointed him a trustee in the place of the society, and made an order vesting the property in him on the trusts applicable thereto under the instrument. *In re RUDDINGTON LAND*

Parker J. 701

**INFANT**—Illegitimate children — Class gift — After-born children—Child en ventre sa mère at date of settlement. — 578  
See SETTLEMENT. 4.

— Newspaper reporter—Unusual stipulation — Reasonable protection of covenantee  
See RESTRAINT OF TRADE. 763

**INFRINGEMENT**—Patent — — — 801  
See PATENT. 1.

**INJUNCTION**—Contract of service—Agreement to refer disputes to foreign tribunal—Stay of proceedings — — — 413  
See CONTRACT OF SERVICE.

— Mandatory injunction—Restrictive covenants—"Offensive" trade or business—Bill-posting—Advertisement hoarding  
See BUILDING ESTATE. 734

— Water company—"Supply of water"—Supplying water outside statutory limits—Injunction — — — 636  
See WATER. 3.

**INJUNCTION**—*continued.*

— Watercourse — Artificial channel — Mill stream—Title to bed of stream—Easement—Right to flow of water—Trespass — — — — — 427  
See WATERCOURSE.

**INSPECTION** — Trade union — Books and accounts — Right to employ agent to inspect — — — — — 561  
See TRADE UNION. 1.

**INSTRUCTIONS** — Will — Latent ambiguity — Name—Misdescription—Extrinsic evidence—Admissibility — — — 60  
See WILL. 7.

**INSURANCE (LIFE)**—*Deposit — Amalgamation — Dissolution — Repayment of Deposit — Life Assurance Companies Act, 1870 (33 & 34 Vict. c. 61), s. 3.*

In 1904 the Popular Life Assurance Company was incorporated and made the statutory deposit of 20,000*l.* They did not accumulate out of premiums any life assurance fund, and in 1906 they agreed to sell their business and assets to the United Provident Assurance Company in consideration of "shares in that company. The vendor company passed resolutions for a voluntary winding-up, and their property and policies had been transferred, the shares allotted, all claims on the vendor company discharged, and the company itself dissolved. The purchasing company now petitioned for the payment out of Court to them of the 20,000*l.* deposited by the vendor company :—

*Held*, that although the vendor company had not accumulated a life assurance fund, yet, inasmuch as their obligations had come to an end on dissolution, the deposit ought to be paid out to the petitioners as their assignees.

*Ex parte Scottish Economic Life Assurance Society*, (1890) 45 Ch. D. 220, distinguished. *In re POPULAR LIFE ASSURANCE COMPANY, LIMITED* — — — — — Warrington J. 80

— Antecedent debt — Security — Policy of assurance — Interests based on valuable consideration — — — — — 291  
See CONSIDERATION.

**INTEREST**—Company — Winding-up—Petition — Creditor — Debenture stockholder — Unpaid interest — — — — — 446  
See COMPANY. 7.

— Purchaser, Default of—Reasonable conduct — Settled account — — — — — 648  
See VENDOR AND PURCHASER. 1.

— Will—Annuity—Direction to purchase—Death of annuitant before purchase  
See ANNUITY. 2. 276

**INTERPRETATION ACT** — Local education authority — Council of county borough — Corporation acting by council — 500  
See EDUCATION.

**INTESTACY**—Death of mortgagee intestate—Devolution of mortgage debts—Merger  
See ADMINISTRATION. 1. 367

— Will—Class gift—Revocation by codicil  
See WILL. 1. 103

**INVESTMENT**—Trustees.

See under TRUSTEE.

**JERSEY**—Covenant to settle wife's after-acquired property—Construction—Land in Jersey—Consideration for transfer necessary— - - - 304  
See SETTLEMENT. 2.

**JEWELLERY**—Married woman—Appointment—Separate estate—"Liable for her debts or other liabilities"— - - 1  
See HUSBAND AND WIFE. 2.

**JOINDER**—Plaintiff's right to sue without Attorney-General—Water company—Trespass—Ultra vires— - - 70  
See WATER. 2.

—Practice—Pauper—"Not worth 25*l*."—Married woman plaintiff—Joinder of husband— - - - 471  
See HUSBAND AND WIFE. 3.

**JOINT TENANCY**—Or tenancy in common—Class—Will—Construction— - 385  
See WILL. 6.

**JUDICIAL TRUSTEES.**

See under TRUSTEE.

**LAND REGISTRY**—Restriction on Register—Religious Society—Purchase of Land—Wesleyan Methodist Chapel—Model Deed—Power of Sale—Proceeds applicable as Income—Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), s. 62—Endowment—Consent of Charity Commissioners—Exemption—Registration under Land Transfer Acts, 1875 (38 & 39 Vict. c. 87) and 1897 (60 & 61 Vict. c. 65), Part II.

By a conveyance on sale dated February 13, 1906, a piece of land in the administrative county of London and contiguous to other land already held by them was conveyed to the trustees of a Wesleyan Methodist chapel upon the trusts of the model deed for Wesleyan Methodist chapels. Clause 36 of the model deed provided that upon a sale of land subject to the trusts thereof the trustees should apply the net proceeds "either for or toward promoting the preaching of the Gospel amongst the said people called Methodists, in the circuit in which the said chapel or place of religious worship shall, for the time being, be situated, or" otherwise as therein mentioned:—

*Held*, that inasmuch as the case came within the exemption provided by s. 62 of the Charitable Trusts Act, 1853, the trustees were entitled to be registered as proprietors of the piece of land so conveyed to them, without the entry on the register of any restrictions on their right to deal with the land.

*In re Clergy Orphan Corporation*, [1894] 3 Ch. 145, and *In re Church Army*, [1906] W. N. 73; 94 L. T. 559, followed. *In re WESLEYAN METHODIST CHAPEL IN SOUTH STREET, WANDSWORTH* - - - **Joyce J. 454**

**LAND TRANSFER**—Will—Mixed fund—Express charge of debts—Period of limitation— - - - 791  
See WILL. 8.

**LANDLORD AND TENANT**—Building Estate—Restrictive Covenant—Lessor's Covenant not to infringe the Building Line on Plot adjoining demised Premises—Covenant running with the Land—"Assign"—Breach—Damages.

A covenant in a lease that the lessor and his assigns will not erect or permit to be erected any buildings in front of the building line on the land adjoining the demised premises is a covenant that "touches or concerns the thing demised" within the second resolution in *Spencer's Case* (1582) 5 Rep. 16 b; 1 Sm. L. C., 11th ed. p. 55, and therefore runs with the land.

A corporation, owners of a building estate, granted a lease of a plot of land to A. for ninety-nine years, and entered into a restrictive covenant as above with A., his executors, administrators, and assigns, in respect of the plot of land adjoining the demised premises. Afterwards they entered into a building agreement with B. in respect of the adjoining plot of land, under which B. was to submit his building plans to them for approval, and on approval was to build forthwith in accordance with the plans, and on completion of his buildings was to have a ninety-nine years' lease of the plot. On B.'s plans (which did not shew the building line) being approved, he forthwith erected his buildings which infringed the building line. On complaint by the assignee of A.'s lease, the corporation served B. with a notice to observe the building line, but took no further steps against him, and subsequently proposed to grant him his lease:—

*Held*, that the covenant in A.'s lease touched or concerned the thing demised and ran with the land so as to entitle his assignee to sue the corporation on the covenant.

*Held*, also, that B. was an "assign" of the corporation and that they were liable in damages for his breach of the covenant.

*Semble*, that even if B. was not an "assign" the corporation had under the circumstances "permitted" a breach of the covenant.

**RICKETTS v. ENFIELD CHURCHWARDENS**  
**Neville J. 544**

2. — Lease—Option to purchase Landlord's Interest—Condition Precedent—Rent "in the meantime" to have been "duly" paid—Part of Purchase-money to be left on Mortgage—Specific Performance.

Defendant, the lessee of a house, let the house to plaintiff at a rent payable quarterly in advance. The tenancy agreement gave plaintiff an option to purchase defendant's interest in the house on the plaintiff giving defendant notice in writing of the intention to purchase, provided plaintiff should "in the meantime have duly paid the said rent hereby reserved." The plaintiff did not pay the rent due on December 25, 1907, until January 10, 1908. On March 20, 1908, the plaintiff gave notice of her intention to purchase:—

*Held*, that "duly" did not mean punctually, and that the condition precedent to the exercise of the option had been fulfilled.

*Held*, also, that the fact that the agreement provided that part of the purchase-money should be left on mortgage did not make the agreement



**LANDLORD AND TENANT**—*continued.*

an agreement for a loan, and that specific performance of the agreement must be ordered.  
**STARKEY v. BARTON** - - - **Parker J. 284**

**3. — Lease—Proviso enabling Lessees to determine Lease by Notice—Notice by one of two Lessees—Validity.**

Where a lease contains a proviso enabling the "lessees" to determine the lease by notice, a notice given by one of two lessees will not, in the absence of evidence of authority from the other lessee to give it or of circumstances from which the Court can infer such authority, be effectual to determine the lease.

*Doe v. Summerson*, (1830) 1 B. & Ad. 135, distinguished. *In re Viola's Indenture of Lease*. **HUMPHREY v. STENBURY**  
**Warrington J. 244**

**LANDS CLAUSES ACTS**—Costs of probate—

Death of vendor before completion—  
 Vendor's will - - - - **55**  
*See COSTS.*

— Lease—Covenants—Breaches—Re-entry—  
 Compulsory purchase by public body—  
 Severance of reversion—Compensation  
*See LEASE.* **134**

— Payment of purchase-money into Court—  
 Scheme for administration of charity—  
 Costs of application for scheme - **263**  
*See CHARITY. 1.*

**LATENT AMBIGUITY**—Name—Misdescription  
 —Extrinsic evidence—Instructions—  
 Admissibility - - - - **60**  
*See WILL. 7.*

**LEASE**—Covenants—Breaches—Re-entry—Compulsory Purchase by Public Body—Severance of Reversion—Involuntary Act of Lessor—Apportionment of Condition—Notice of Breaches—Sufficiency—Compensation—Damages—*Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 68—Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 14.*

In pursuance of statutory powers a county council gave notice to P. and D. for the compulsory purchase of a strip of land comprising one-third of the site of two cottages, with gardens, for the purpose of widening a road. P. was the owner of the reversion of the premises, which were subject to a lease granted in 1867 for a long term of years, and now vested in D. This lease contained covenants by the lessee to repair the cottages and cultivate the garden ground in a husbandlike manner, with a proviso for re-entry on breaches of covenants. P. conveyed his interest in the strip to the council, but desired that the other two-thirds of the cottages should be left standing. The council, having purchased from D. the whole of the leasehold interest in the property and obtained an assignment of the lease, entered and entirely demolished the cottages, and let the garden ground for the purposes of a stonemason's yard. P. gave notices to the council, setting out the covenants in the lease, specifying the nature of the breaches, and requiring the council to remedy the same and make compensation. On their failure to comply,

**LEASE**—*continued.*

P. brought an action against the council to recover possession of the leasehold interest in the two-thirds on the ground of breaches of covenant, and he also claimed mesne profits and damages:—

*Held*, (1.) that the severance of the reversion having arisen from the involuntary and not the voluntary act of the lessor, the condition of re-entry was still enforceable, and the action maintainable: *Winter's Case*, (1572) 3 Dyer, 208 b, followed.

(2.) That P. was not limited to a claim for compensation under s. 68 of the Lands Clauses Consolidation Act, 1845, which was inapplicable to acts ultra vires of the council.

(3.) That the notices of breaches were sufficient within s. 14 of the Conveyancing and Law of Property Act, 1881, as it was unnecessary for the lessor to indicate what he required the lessee to do.

(4.) That P. was entitled to the relief asked and 100*l.* damages. **PIGGOTT v. MIDDLESEX COUNTY COUNCIL** - - - **Eve J. 134**

— Landlord and tenant.  
*See under LANDLORD AND TENANT.*

— Settled land—Trustees—Open brickfield—  
 Implied power to let from year to year  
 —Royalties—"Rents, issues and profits"  
*See SETTLED LAND. 1.* **625**

— Surrender of—Tenant for life and remainderman—Capital or income - **815**  
*See SETTLED LAND. 3.*

— Trustee—Investment—Breach of trust—  
 Hazardous security—Depreciation—  
 Repairs - - - - **389**  
*See TRUSTEE. 2.*

**LEGACIES**—Will—Construction.  
*See under WILL.*

**LIEN**—Solicitor—Company—Winding-up—  
 Liquidator—Documents in solicitor's  
 hands before winding-up order - **96**  
*See SOLICITOR. 2.*

**LIFE INSURANCE.**  
*See under INSURANCE (LIFE).*

**LIGHT**—Easement of—Business premises—  
 Compensation—Evidence of loss of  
 trade, Admissibility of - - - **528**  
*See HOUSING OF THE WORKING CLASSES.*

**LIMITATIONS, STATUTES OF**—*Recovery of Land—Action for Assignment of Dower—Time for ascertaining Value—Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), s. 2—Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 1.*

The Real Property Limitation Act, 1833, as amended by the Real Property Limitation Act, 1874, does not apply to an action for assignment of dower.

*Marshall v. Smith*, (1865) 5 Giff. 37, overruled upon this point.

A dowress has two separate and independent rights, namely, a right to one third of the rents and profits from the death of the husband, and a



**LIMITATIONS, STATUTES OF**—*continued.*

right to have dower assigned to her; and if she claims and enjoys her right to the receipt of the rents and profits she will not be prejudiced by reason of not having, during that period, claimed her right to an assignment.

But *semble*, if for more than twelve years she does not claim any of her rights, the Court ought to refuse her relief on the ground of laches.

Dower ought to be assigned according to the value at the time of the assignment, and not according to the value at the time of the husband's death. **WILLIAMS v. THOMAS**

C. A. 713

— Mines—Tenants in common—Working of part of mine by one co-owner—Adverse possession—Account - - - **666**  
See **MINES**. 2.

— Will — Mixed fund — Implied charge of legacies — Express charge of debts — Period of limitation - - - **791**  
See **WILL**. 8.

**LIQUIDATOR**—Company,  
See under **COMPANY**.

**LOCAL AUTHORITY**—Education.  
See under **EDUCATION**.

— Housing of the working classes.  
See under **HOUSING OF THE WORKING CLASSES**.

**LOCAL GOVERNMENT**—Streets.  
See under **STREETS**.

**LOCKE KING'S ACT** — Will — Exoneration — Mortgage debt - - - **787**  
See **WILL**. 3.

**LONDON**—Burial — Parish — Vestry — Borough council—Transfer of powers and property — Exception of ecclesiastical powers and property - - - **592**  
See **BURIAL**.

— Gas—"Supply of gas"—Metropolis Gas Act, 1860 - - - **636**  
See **WATER**. 3.

**LUNACY**—*Criminal Lunatic—Necessaries—Past Maintenance—Implied Obligation—Debt—Claim by Crown for Arrears—Criminal Lunatics Act, 1884 (47 & 48 Vict. c. 64), s. 10, sub-s. 1, 3—Lunatic Asylums Act, 1853 (16 & 17 Vict. c. 97), s. 104.*

Under the Criminal Lunatics Act, 1884, s. 10, sub-s. 3, which incorporates by reference the language of s. 104 of the Lunatic Asylums Act, 1853, the cost of the maintenance of a criminal lunatic can be recovered by the Crown against property to which the lunatic has become entitled, as being due under an implied obligation to pay for that maintenance as a necessary; and this is a statutory liability for the whole amount expended in respect of which there is no limitation against the Crown. *In re J. (A PERSON OF UNSOUND MIND)*— **C. A. 574**

2. — *Practice—Mental Infirmary—Stockholder—Dividends—Receiver—Accrued Dividends—Form of Order—Transfer into Court—Bank of England—Indemnity—Lunacy Act, 1890 (53 & 54 Vict. c. 5), ss. 116, 146, 333.*

**LUNACY**—*continued.*

Where an order is made by a Master in Lunacy under s. 116 of the Lunacy Act, 1890, appointing a receiver, on completing his security, to receive all dividends and arrears thereof to which a person suffering from "mental infirmity" is or may become entitled, "including dividends accrued and to accrue due before lodgment upon the funds to be lodged pursuant to the lodgment schedule," and directing the lodgment in Court of certain Bank of England securities, the Bank must pay all arrears of dividends accrued before lodgment direct to the receiver and not into Court.

The Bank may safely act upon an order in this form, and in so doing is clearly within the indemnity provided by ss. 146 and 333.

*In re Browne*, [1894] 3 Ch. 412, discussed and applied. *In re SPURLING* - **C. A. 199**

**MAINTENANCE** — Criminal lunatic — Necessaries — Past maintenance — Debt — Claim by Crown for arrears - **574**  
See **LUNACY**. 1.

**MANDATORY INJUNCTION** — Restrictive covenants—"Offensive" trade or business — Bill-posting — Advertisement hoarding - - - **734**  
See **BUILDING ESTATE**.

**MANDATORY ORDER**—Shareholders' address book—Right of shareholder to copy—Motives - - - **708**  
See **COMPANY**. 2.

**MARRIAGE SETTLEMENT.**  
See under **SETTLEMENT**.

**MARRIED WOMAN.**  
See under **HUSBAND AND WIFE**.

**MEETINGS**—Company—Vesting of management in directors—Control of management by company in general meeting - **311**  
See **COMPANY**. 4.

**MERGER**—Mortgage in fee—Equities of redemption acquired by mortgagee subject to the mortgages — Declaration against merger—Death of mortgagee intestate  
See **ADMINISTRATION**. 1. **367**

**METROPOLIS.**  
See under **LONDON**.

**MILL STREAM** — Artificial channel—Riparian proprietors—Title to bed of stream—Easement—Right to flow of water—Presumption - - - **427**  
See **WATERCOURSE**.

**MINES** — *China Clay — Mines and "other Minerals" — Railway Company — Compulsory Purchase of Surface—Right to Support—Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), ss. 77, 78.*

China clay underlying land in Cornwall purchased by a railway company for the purposes of its undertaking, and occupying only a small fraction of the subsoil, is a "mineral"

**MINES**—*continued*.

within the meaning of s. 77 of the Railways Clauses Consolidation Act, 1845.

*Lord Provost and Magistrates of Glasgow v. Farie*, (1888) 13 App. Cas. 657, distinguished. *GREAT WESTERN RAILWAY COMPANY v. CARPALLA UNITED CHINA CLAY COMPANY*

C. A. 218

2. — *Coal—Tenants in Common—Working of Part of Mine by one Co-owner—Adverse Possession—Constructive Possession—Presumption—Trespasser—Account—Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), ss. 12, 34—Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 1.*

Where title is founded on an adverse possession, the title will be limited to that area of which actual possession has been enjoyed, and, as a general rule, constructive possession of a wider area will only be inferred from actual possession of the limited area, if the inference of such wider possession is necessary to give effect to contractual obligations, or to preserve the good faith and honesty of a bargain.

The plaintiffs, who were together entitled to one undivided one-sixth part of the mines under a mountain of ninety-two acres, brought an action against the defendant, who was admittedly entitled to another undivided one-sixth part of the same mines, and asked for an account of the coal worked by him. It was proved in evidence that more than twelve years before the commencement of the action the predecessors in title of the defendant, under licences from the owners of the other four-sixths of the mines, but without the licence of the plaintiffs, had commenced to work out the coal under the mountain from an area of two acres, and had remained in possession of that worked-out area, or cavity, ever since. The defendant claimed that possession of part of the mine entitled him to constructive possession of the whole area of the mine horizontally and vertically under the mountain:—

*Held*, that the defendant, having been in adverse possession of the plaintiffs' one-sixth part, which must be treated as a separate tenement, for more than the required statutory period, had acquired a good title under the Statute of Limitations to the two-acre area, of which his predecessors had been in actual possession, and no more.

*Held*, therefore, that the plaintiffs were entitled to an account of the coal, except that taken from the two-acre area, such account to be limited to six years before action brought. *GLYN v. HOWELL* — — — *Eve J. 666*

3. — *Overlying and underlying Seams of Coal—Powers of Working—Subsidence—Right to Support—Evidence—Necessary Implication.*

In construing instruments which involve the severance of surface or of a higher seam and subjacent minerals, it is presumed that the owner of the surface or of the higher seam intends to reserve his common law right of support; the onus of shewing that this was not the intention of the parties to the deed lies on the mineral owner, and this onus is not discharged by the insertion of full powers of work-

**MINES**—*continued*.

ing and carrying away all the minerals expressed in general terms, or of wide provisions for compensation. But when the mineral owner proves not only that the upper seam will not be destroyed, but only injured to such an extent as will admit of compensation, and, further, that it is impossible to get the minerals at all without letting down the upper seam, all reasons for qualifying the general words of the powers of working are gone, and if the terms of the instruments make it clear that it was the intention of the parties that subjacent seams should be worked, it is a necessary implication that they intended that there should be a subsidence of superjacent strata.

*Butterknowle Colliery Co. v. Bishop Auckland Industrial Co-operative Co.*, [1906] A. C. 305, distinguished.

Decision of *Neville J.*, [1908] 2 Ch. 475, reversed. *BUTTERLEY COMPANY, LIMITED v. NEW HUCKNALL COLLIERY COMPANY, LIMITED* C. A. 37

**MISDESCRIPTION**—Will—Latent ambiguity—Name—Extrinsic evidence—Instructions—Admissibility — — — 60  
See WILL. 7.

**MISTAKE** — Forgetfulness — Appointment — Deed poll — Rescission — Intention — Equitable relief — — — 476  
See POWER OF APPOINTMENT.

**MONEY-LENDER**—Registration—Mortgage in favour of unregistered Money-lender—Validity—Declaratory Order—Equitable Relief—Imposition of Terms—Money-lenders Act, 1900 (63 & 64 Vict. c. 51), s. 2, sub-s. 1 (a), (b), (c)—Rules of Supreme Court, 1883, Order xxv. r. 5.

The trustee of a debtor under a scheme of arrangement with his creditors brought an action against an unregistered money-lender, who, in the course of his business, had taken a mortgage from the debtor to secure a loan, for a declaration that the mortgage was illegal and void under s. 2 of the Money-lenders Act, 1900:—

*Held*, that the Court had power to give a declaratory judgment, although no ancillary relief was claimed, and that it ought not to impose upon the plaintiff equitable terms as to repayment of the actual money advanced as a condition of giving the declaratory judgment.

*Lodge v. National Union Investment Co.*, [1907] 1 Ch. 300, distinguished.

Decision of *Eve J.*, [1908] 2 Ch. 612, affirmed. *CHAPMAN v. MICHAELSON* — — — C. A. 238

**“MOORING”**—Pier—Unauthorized construction — Rates for passengers — Rates for vessels “mooring” — — — 209  
See PIER.

**MORTGAGE**—Equitable Mortgages—Subsequent Execution by Mortgagor of Deed of Assignment of all his Property for Benefit of Creditors—Registration—Priorities—Yorkshire Registries Act, 1884 (47 & 48 Vict. c. 54), s. 14.

On October 3, 1906, C. executed a legal

**MORTGAGE** *continued.*

mortgage of land situate in Yorkshire to a bank, and that mortgage was duly registered under the Yorkshire Registries Act, 1884. C. had previously created an equitable charge on the land in favour of H. & W., but that charge was not registered until October 5, 1907. On August 30, 1907, C. executed a deed of assignment in common form of all his real and personal estate to a trustee for the benefit of his creditors generally, and that deed was registered on September 11, 1907. There were other equitable mortgages which had been created by C. prior to 1907, but which had not been registered. In 1908 the bank sold the property comprised in their security, and after satisfying their claim had a balance in their hands. This balance was claimed by the trustee as against H. & W. on the ground that his deed, though later in date of execution than H. & W.'s charge, was prior to it in date of registration:—

*Held*, upon the construction of the deed, that only such interest in the property as C. then possessed passed to his trustee, namely, the property subject to the equitable mortgages upon it, and therefore that the question as to priority of registration did not arise.

*Held*, therefore, that the claim of the trustee must be postponed to the claims of all the prior equitable mortgagees who established them, whether their mortgages were registered or not. **JONES v. BARKER** — — **Warrington J. 321**

**2. — Redemption—Consolidation—Mortgage in Name of Trustee—Mortgage originally made by different Mortgagors—Assignment of Equities of Redemption to same Person.**

S. executed to R. separate mortgages of four leasehold houses and assigned the equities of redemption to the plaintiff. One house was sold and the mortgage upon it paid off. The plaintiff then acquired the freehold of another house (No. 7) and granted a long lease of it to C., who executed a mortgage of the leasehold to R. In this transaction C. was a mere trustee for the plaintiff. Subsequently the plaintiff got rid of the freehold reversion in No. 7 and took an assignment from C. of the equity of redemption in the leasehold interest. R. died, and this summons was taken out by the plaintiff against his executors for redemption of No. 7. The defendants claimed to consolidate the mortgage on No. 7 with those on the other three houses. All the mortgages contained clauses excluding s. 17 of the Conveyancing Act, 1881:—

*Held*, that the fact that C. was a trustee for the plaintiff gave the defendants no right to consolidate with the mortgage of No. 7 made by C. the other three mortgages, for a mortgagee has no right for the purpose of consolidation to go behind the mortgagor and inquire into equitable interests.

*Held*, also, that the assignment of C.'s interest to the plaintiff gave no right of consolidation, for the right to consolidate can only arise when all the mortgages were originally made by the same mortgagor. It is not enough that the different equities of redemption have got into the same hands by assignment. **SHARP v. RICKARDS** — — — **Neville J. 109**

**MORTGAGE** *—continued.*

— “Eldest son”—Accelerating period of distribution — — — **534**  
*See SETTLEMENT. 3.*

— Equities of redemption acquired by mortgagee subject to the mortgages — Declaration against merger—Death of mortgagee intestate — Devolution of mortgage debts — — — **367**  
*See ADMINISTRATION. 1.*

— Lease — Option to purchase landlord's interest—Condition precedent—Part of purchase-money to be left on mortgage  
*See LANDLORD AND TENANT. 2. 284*

— Money-lender—Registration—Mortgage in favour of unregistered money-lender—Declaratory order — Equitable relief  
*See MONEY-LENDER. 238*

— Trustee—Investment—Breach of trust—Valuation — Underlease—Contributory mortgage — — — — **328**  
*See TRUSTEE. 4.*

— Trustee — Investment — Breach of trust—Valuation, Method of—“Two thirds” limit—Depreciation — — — **389**  
*See TRUSTEE. 2.*

— Trustee—Investment—Mortgage—Duty of trustee to make periodical or further investigations — — — **409, n.**  
*See TRUSTEE. 3.*

— Will—Exoneration—Mortgage debt — **787**  
*See WILL. 3.*

**NAME** — Will — Latent ambiguity—Misdescription—Extrinsic evidence—Instructions — Admissibility — — — **60**  
*See WILL. 7.*

**NAVIGATION COMPANY** — Prescriptive claim against statutory navigation company — Prescriptive claim to take surplus water only—User unlimited — **775**  
*See PRESCRIPTION.*

**NECESSARIES** — Criminal lunatic—Past maintenance—Debt—Claim by Crown for arrears — — — — **574**  
*See LUNACY. 1.*

**NEGLIGENCE** — Trustee — Investment—Breach of trust—Method of valuation—“Two thirds” limit—Leases—Depreciation — Repairs — — — — **389**  
*See TRUSTEE. 2.*

**NEPHEWS AND NIECES** — Gifts to—Will—Construction — Words of futurity — Niece dead at date of will leaving child  
*See WILL. 12. 424*

**NEWSPAPER REPORTER** — Unusual stipulation—Infant—Reasonable protection of covenant—Public policy — — **763**  
*See RESTRAINT OF TRADE.*

**NEXT OF KIN** — Class—Statute of Distributions — Joint tenancy or tenancy in common  
*See WILL. 6. 385*



**NIECES.**

See under NEPHEWS AND NIECES.

**NOTICE**—Lease—Notice by one of two lessees—  
Validity - - - - - 244  
See LANDLORD AND TENANT. 3.

— Street, New—Notice to frontagers to metal  
and make good—No reference to de-  
posited plan—Sufficiency of notice,  
Objection to - - - - - 87  
See STREETS. 2.

**NOVELTY**—Want of—Particulars of objection  
See PATENT. 2. 744

**NUISANCE**—Pier—Unauthorized construction  
—Public right of access - - - 209  
See PIER.

**OPTION**—Lease—Option to purchase landlord's  
interest—Condition precedent—Speci-  
fic performance - - - - - 284  
See LANDLORD AND TENANT. 2.

**"OUTBUILDING"** — Restrictive covenant —  
Objection to submit plans - - - 680  
See COVENANT.

**PARLIAMENT**—Trade union—Objects of union  
—Rules—Parliamentary representation  
—Ultra vires - - - - - 163  
See TRADE UNION. 2.

**PARTICULARS**—Patent—Alleged infringement  
—Defence of prior user - - - 801  
See PATENT. 1.

— Patent—Want of novelty—Sufficiency—  
Particulars of objection - - - 744  
See PATENT. 2.

**PATENT** — *Alleged Infringement — Defence of  
Prior User—Particulars—Rules of the Supreme  
Court, 1883, Ord. LIII.A. r. 18.*

The keynote of the provision in Order LIII.A., r. 18—that where prior user is alleged as an objection to the validity of a patent the particulars of the prior user must "contain a description (accompanied by drawings if necessary) sufficient to identify such alleged prior user, and if such user relates to any machinery or apparatus shall specify whether the same is in existence and where the same can be inspected"—is in the words "sufficient to identify such alleged prior user," and the object of the rule was to meet the difficulties which arose under the former practice by reason of a party being ignorant up to trial as to the case of prior user which he had to meet, and his opponent being unfettered as to what at the trial he should adduce as an example of prior user.

Nature of order to be made on application for further particulars of prior user. *CROSTHWAITE FIRE BAR SYNDICATE v. SENIOR Parker J. 801*

2. — *Practice—Patent Action—Particulars of Objection—Want of Novelty—Sufficiency—Rules of the Supreme Court, 1883, Ord. LIII.A. r. 18.*

Rule 18 of Order LIII.A., which deals with particulars of objection as to want of novelty in

**PATENT**—*continued.*

a patent action, distinguishes between a patent for a process and a patent for machinery or apparatus, and requires less detailed particulars in the former case than in the latter; and where prior user is alleged and the plaintiff's patent is for a process only, if the defendant has satisfied the requirements of the rule as to names, places, and dates, he will only be required in addition to give a description sufficient to identify the alleged prior user: he will not be required to give particulars of the apparatus employed by him in working the process relied upon by him as an anticipation nor to allow inspection of any samples in his possession of substances treated by that process. *MINERALS SEPARATION, LIMITED v. ORE CONCENTRATION COMPANY (1905), LIMITED - - - C. A. 744*

3. — *Prolongation, Petition for—Questions to be considered—Patents and Designs Act, 1907 (7 Edw. 7, c. 29), s. 18.*

The power given to the Court by s. 18 of the Patents and Designs Act, 1907, to extend the term of a patent is a discretionary power which can only be exercised when the Court is satisfied that the patentee has been inadequately remunerated by his patent, and it is only where the value of the patentee's disclosure to the public largely exceeds the benefit derived by him from the patent that he can be said to have been inadequately remunerated. On an application for extension, the first question for consideration is the nature of that disclosure, and, to determine what that nature is and what its value to the public is, questions of novelty and subject-matter, though not directly in issue, are of considerable materiality; evidence on these points cannot be altogether excluded, and it is the applicant's duty at the outset to bring to the notice of the Court all that may in any way affect its judgment on these matters, but as a general rule it is sufficient for the petitioner to shew a prima facie case in support of novelty and subject-matter. The Court will pay especial attention to the fact that, although the thing disclosed may be minute as compared with the sum total of what was known previously, it may be the sine qua non of the successful application of existing knowledge and thus fall within the category of great inventions.

For the purpose of considering whether a patentee has been adequately remunerated profits on his foreign as well as on his English patents must be taken into account, and some allowance ought to be made for future profits on either which will probably be received before their expiration.

An applicant for extension must prove that he has done all a patentee could do to launch his invention on the British market, and it is his duty to state in his petition the facts of any alleged anticipation and to give such explanation as he can thereof, without leaving it to an objector to bring out those facts.

Duty of the Comptroller-General, when opposing an extension on the ground that British traders will unduly suffer if the extension be granted, defined. *In re JOHNSON'S PATENT (No. 2) - - - Parker J. 114*



**PAUPER**—Married woman plaintiff—"Not worth 25*l*."—Restraint on anticipation  
See **HUSBAND AND WIFE**. 3. 471

**PAYMENT INTO COURT**—Scheme for administration of charity—Costs of application for scheme—Lands Clauses Acts 263  
See **CHARITY**. 1.

**PAYMENT OUT**—Settled land—Payment out to trustees—Money liable to be invested in land—Capital money - - - 468  
See **SETTLED LAND**. 2.

**PETITION**—Company—Winding-up—Creditor—Debenture stockholder—Unpaid interest - - - - 446  
See **COMPANY**. 7.

—Patent—Prolongation—Questions to be considered - - - - 114  
See **PATENT**. 3.

**PIER**—Unauthorized Construction—Nuisance—Public Right of Access—Rates for Passengers—Rates for Vessels "mooring"—Recovery of Rates paid under protest—Foreshore—Crown Grant—Harbours, Docks, and Piers Clauses Act, 1847 (10 & 11 Vict. c. 27), ss. 2, 25, 33, 47—General Pier and Harbour Act, 1862 (25 & 26 Vict. c. 19), ss. 6, 13, 17, 19—Crown Lands Act, 1829 (10 Geo. 4, c. 50), s. 73—Crown Lands Act, 1866 (29 & 30 Vict. c. 62), s. 20.

A provisional order of the Board of Trade, confirmed by a special Act of Parliament, authorized a company to construct a pier and provided that when a certificate of the due construction of the pier had been given by the Board the company might levy certain rates on passengers using the pier and on vessels "mooring" within limits defined by the order. In 1900 H., who had acquired the pier from the assigns of the liquidator of the company, discovered that the pier had not been constructed within the limits of deviation fixed by the order, and that the certificate of the Board of Trade had not been given; and thereupon, with the view of perfecting his title, he obtained from the Crown a grant of the foreshore and bed of the sea on which the pier stood. In 1907 the plaintiffs ran passenger steamers to the pier, and the M. Company, to whom H. had leased the pier, refused to allow the plaintiffs' steamers to come alongside the pier except on payment of a lump sum for the season for passenger rates, and also "mooring" rates. The plaintiffs brought an action for an injunction to restrain the M. Company and H. from excluding them and their passengers from using the pier and for repayment of rates paid under protest:—

*Held*, that H. was now by virtue of grants from the Crown owner of the soil and the structure upon it, and was entitled to say that the pier had not been built under the powers conferred by, and was not subject to the liabilities imposed by, the provisional order; that it was his pier, and whether it was a nuisance or not (as to which the Court expressed no opinion) he was in a position to exclude the plaintiffs from it.

Decision of Neville J., [1908] 2 Ch. 460, affirmed. **LIVERPOOL AND NORTH WALES STEAMSHIP COMPANY v. MERSEY TRADING COMPANY** - - - - C. A. 209

**PLANS**—Restrictive covenant—Obligation to submit plans—"Outbuilding" - 680  
See **COVENANT**.

**POLICY**—Life insurance.  
See under **INSURANCE (LIFE)**.

**POSSESSION**—Mines—Tenants in common—Working of part of mine by one co-owner—Adverse possession—Constructive possession—Account - - 666  
See **MINES**. 2.

**POSTPONEMENT**—Will—Trust for sale of land—Power to postpone—Settlement of proceeds—Share vested in possession  
See **WILL**. 10. 631

**POWER OF APPOINTMENT**—Mistake—Forgetfulness—Appointment—Deed Poll—Rescission—Intention—Equitable Relief.

An appointment by deed poll, made in entire forgetfulness by the appointor of an earlier appointment to the same person, may be rescinded and set aside on the ground of mistake. **LADY HOOD OF AVALON v. MACKINNON**

Eve J. 476

—Estate duty payable in respect of appointed fund—"Property passing to executor as such" - - - - 20  
See **REVENUE**.

—Married woman—Appointment—Separate estate—"Liable for her debts or other liabilities" - - - - 1  
See **HUSBAND AND WIFE**. 2.

—Married woman—Separate estate—General power of appointment—Costs—Execution—Elegit - - - - 557  
See **HUSBAND AND WIFE**. 1.

—Trustees.  
See under **TRUSTEE**.

**PRACTICE**—Pauper—"Not worth 25*l*."—Married woman plaintiff—Restraint on anticipation - - - - 471  
See **HUSBAND AND WIFE**. 3.

—Settled land.  
See under **SETTLED LAND**.

**PRESCRIPTION**—Prescriptive Claim against Statutory Navigation Company—Prescriptive Claim to take Surplus Water only—User unlimited.

The relators and plaintiffs, a statutory navigation company, claimed to restrain the defendants from taking water from a river forming part of their navigation. The defendants did not admit that the river was vested in the plaintiffs and claimed a prescriptive right to take from the river superfluous water not required for the purposes of the navigation. The user proved was that the defendants took as much water as they required without regard to the needs of the navigation:—

*Held* by Neville J., that the prescription must be limited and defined by the user, and the user being unlimited and not confined to water not needed for the discharge of the statutory duties of the plaintiff company, the prescription was for a right which the plaintiffs could not

**PRESCRIPTION**—*continued.*

grant and which could not be obtained against them by prescription.

*Held* by the Court of Appeal, that the plaintiffs had not under their statutes any proprietary right in the water, and therefore the claim failed. The point decided by Neville J. doubted but not decided. ATTORNEY-GENERAL *v.* GREAT NORTHERN RAILWAY COMPANY

C. A. 775

**PRESUMPTION**—Highway—Dedication—Public user—Settled land—Churchway 12  
*See* HIGHWAY.

—— Watercourse—Artificial channel—Right to flow of water — — — 427  
*See* WATERCOURSE.

**PRIORITY**—Equitable mortgages—Subsequent execution by mortgagor of deed of assignment—Registration—Yorkshire Registries — — — 321  
*See* MORTGAGE. 1.

**PROBATE**—Costs—Taxation—Lands Clauses Act—Death of vendor before completion—Vendor's will—Costs of probate  
*See* COSTS. 55

**PROLONGATION**—Patent—Petition for prolongation—Questions to be considered  
*See* PATENT. 3. 114

**"PROSPECTUS"**—Company—Allotment—Minimum subscription not stated—More than one prospectus — — 127  
*See* COMPANY. 1.

**PROVIDENT SOCIETIES.**  
*See* INDUSTRIAL AND PROVIDENT SOCIETIES.

**PUBLIC HEALTH**—Streets.  
*See* under STREETS.

**PUBLIC POLICY**—Newspaper reporter—Unusual stipulation—Infant—Reasonable protection of covenantee — 763  
*See* RESTRAINT OF TRADE.

**PURCHASER**—Vendor and.  
*See* under VENDOR AND PURCHASER.

**RAILWAY**—Mines and "other minerals"—China clay—Compulsory purchase of surface—Right to support — — 218  
*See* MINES. 1.

**RATES**—Pier—Unauthorized construction—Nuisance—Rates for passengers—Rates for vessels "mooring"—Recovery of rates paid under protest — — 209  
*See* PIER.

**REAL ESTATE CHARGES ACT, 1854**—Will—Exoneration—Contrary or other intention—Mortgage debt — — — 787  
*See* WILL. 3.

**REAL PROPERTY LIMITATION.**

*See* under LIMITATIONS, STATUTES OF.

**REAL PROPERTY LIMITATION**—*continued.*

—— Mines—Tenants in common—Working of part of mine by one co-owner—Adverse possession— — — 666  
*See* MINES. 2.

**RECEIVER**—Lunacy—Accrued dividends—Form of order—Transfer into Court—Bank of England—Indemnity — 199  
*See* LUNACY. 2.

**RECONSTRUCTION**—Amalgamation and—Unfair scheme—Contributory's petition impeaching scheme — — — 491  
*See* COMPANY. 6.

**REDEMPTION**—Mortgage in name of trustee—Consolidation—Assignment of equities of redemption to same person 109  
*See* MORTGAGE. 2.

**RE-ENTRY**—Covenantor, Re-entry of—Liability for breach by his assigns—Restrictive covenant — — — 680  
*See* COVENANT.

**REGISTRATION**—Land transfer.  
*See* under LAND REGISTRY.

—— Money-lender.  
*See* under MONEY-LENDER.

—— Trade mark.  
*See* under TRADE MARK.

—— Yorkshire Registries—Equitable mortgages—Subsequent execution by mortgagor of deed of assignment—Registration—Priorities — — — 321  
*See* MORTGAGE. 1.

**RELIGION**—Advancement of—Charitable bequest—Uncertainty — — — 567  
*See* CHARITY. 2.

**REMAINDERMAN**—Tenant for life and—Capital or income—Surrender of lease 815  
*See* SETTLED LAND. 3.

**RENT**—"Rents, issues and profits"—Settled land—Trustees—Open brickfield—Royalties — — — 625  
*See* SETTLED LAND. 1.

**REPAIRS**—Trustee—Investment—Breach of trust—Leases—Depreciation — 389  
*See* TRUSTEE. 2.

**REPORTER**—Newspaper—Unusual stipulation—Infant—Reasonable protection of covenantee—Public policy — — 763  
*See* RESTRAINT OF TRADE.

**RESCISSION**—Mistake—Forgetfulness—Appointment—Deed poll — — 476  
*See* POWER OF APPOINTMENT.

**RESIDUE**—Will—Costs—"Otherwise direct"—Gift to class—Inquiry— — — 810  
*See* WILL. 2.

**RESTRAINT OF TRADE**—*Public Policy*—*Reasonable Protection of Covenantee*—*Newspaper Reporter*—*Unusual Stipulation*—*Infant*.

The defendant, while under age, entered the

**RESTRAINT OF TRADE**—*continued.*

service of the plaintiffs, proprietors of a newspaper in a provincial town where a rival newspaper was established, as junior reporter under a written agreement which provided that he would not, after leaving the plaintiffs' service, "either on his own account or in partnership with any other person, be connected, as proprietor, employee, or otherwise, with any other newspaper business carried on" in the town or within a radius of twenty miles. There was evidence that such a clause was most unusual, almost unique, in agreements of this class. The defendant having entered the service of the rival newspaper:—

*Held* (reversing the decision of *Eve J.*), that the restriction was wider than was reasonably necessary for the protection of the plaintiffs' interest and therefore could not be enforced; that even had it been enforceable against an adult, it would not have been valid as against the defendant, who was an infant when he executed the agreement. *SIR W. C. LENG & CO., LIMITED v. ANDREWS* — — — **C. A. 763**

**RESTRAINT ON ANTICIPATION**—Practice—Pauper—"Not worth 25*l.*"—Married woman plaintiff — — — **471**  
*See HUSBAND AND WIFE. 3.*

**RESTRICTIVE COVENANT.**  
*See under COVENANT.*

**RESULTING TRUST.**  
*See under TRUST.*

**RETAINER**—Trustee—Debt due from legatee to estate—Liability to account—Bankruptcy—Acceptance of dividend—Assent to composition — — — **806**  
*See WILL. 11.*

**REVENUE**—*Estate Duty—Incidence—Personal Property—Exercise by Will of General Power of Appointment—Estate Duty payable in respect of Appointed Fund—"Property passing to Executor as such"—Legal and Equitable Assets—Finance Act, 1894 (57 & 58 Vict. c. 30), s. 6, sub-s. 2; s. 9, sub-s. 1.*

The estate duty payable in respect of personal estate appointed by will under a general power of appointment is not a charge upon the appointed property, but is payable by the executor out of the testator's personal estate.

So *held* by the Court of Appeal, reversing the decision of *Parker J.*

*In re Treasure*, [1900] 2 Ch. 648; *In re Maddock*, [1901] 2 Ch. 372; *In re Power*, [1901] 2 Ch. 659; and *In re Dobson*, [1907] 1 Ch. 284, overruled on this point.

*In re Moore*, [1901] 1 Ch. 691; *In re Dixon*, [1902] 1 Ch. 248; *In re Fearnside*, [1903] 1 Ch. 250; and *In re Orlebar*, [1908] 1 Ch. 136, followed. *In re HADLEY. JOHNSON v. HADLEY* — — — — — **C. A. 20**

**REVERSION**—Severance of—Lease—Covenants—Breaches—Re-entry—Compulsory purchase by public body—Compensation — — — — — **134**  
*See LEASE.*

**REVOCATION**—Will—Class gift—Revocation by codicil—Intestacy — — — **103**  
*See WILL. 1.*

**RIPARIAN PROPRIETORS**—Watercourse.  
*See under WATERCOURSE.*

**RIVER**—Watercourse.  
*See under WATERCOURSE.*

**ROMAN CATHOLIC FAITH**—"Charitable religious or other objects in connection with the"—Uncertainty — — — **567**  
*See CHARITY. 2.*

**"ROYAL"**—Use of word—Trade mark — — — **459**  
*See TRADE MARK.*

**ROYALTIES**—Settled land—Open brickfield—Trustees—Implied power to let from year to year — — — — — **625**  
*See SETTLED LAND. 1.*

**RULES OF SUPREME COURT**—Order XVI. (Parties), rr. 22, 24 — — — **471**  
*See HUSBAND AND WIFE. 3.*

— Order XXV. (Proceedings in Lieu of De-murrer), r. 5 — — — — — **238**  
*See MONEY-LENDER.*

— Order LIIIA (Patents and Designs), 1908, r. 18 — — — — — **744, 801**  
*See PATENT. 1, 2.*

— Order LXV. (Costs), r. 14B — — — **810**  
*See WILL. 2.*

**SALE**—Settled land—Trust for sale that may never arise — — — — — **440**  
*See SETTLED LAND. 4.*

— Trustees—Gift to persons upon trust to sell without adding "and their heirs"—Inability of executors of last surviving trustee to execute trust. — — — **690**  
*See TRUSTEE. 1.*

— Vendor and purchaser.  
*See under VENDOR AND PURCHASER.*

— Will—Trust for sale of land—Power to postpone—Share vested in possession *See WILL. 10.* **631**

**SCHOOL**—Water supply—Bognor Water Act, 1891—"Domestic purposes." — — — **149**  
*See WATER. 1.*

**SEASHORE.**  
*See under FORESHORE.*

**SEPARATE ESTATE**—Married woman.  
*See under HUSBAND AND WIFE.*

**SERVICE**—Contract of.  
*See under CONTRACT OF SERVICE.*

**SETTLED LAND**—Lease—Trustees—Open Brickfield—Implied Power to Let from Year to Year—Royalties—Tenant for Life and Remaindermen—"Rents issues and profits."

A testator, part of whose property consisted of land with brick earth upon it which was being worked under a lease granted by him at a royalty, gave his real estate to trustees upon trust "to pay the rents issues and profits" to certain persons for their lives, with remainders



**SETTLED LAND—continued.**

over. The will contained a trust for sale after the death of the last surviving tenant for life, and a direction that until sale the trustees should cause the real estate to be kept "in good and tenantable order and repair" :—

*Held*, that the trustees had an implied power to let the brickfield from year to year, and that the whole of the rents and royalties must be paid to the tenants for life for the time being. *In re NORTH. GARTON v. CUMBERLAND*

**Swinfen Eady J. 625**

2. — *Payment out to Trustees—Money liable to be invested in Land—Capital Money—Summons—Petition—Practice—Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 21, sub-s. iv.; s. 33—Settled Land Act Rules, 1882, r. 2—Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 14.*

An application for payment out of Court to Settled Land Act trustees of a fund exceeding 1000*l.*, which has not arisen under the Settled Land Act, 1882, but has been derived from another source and is liable to be laid out in the purchase of land to be made subject to the settlement, may be made by petition instead of by summons in chambers under r. 2 of the Settled Land Act Rules, 1882. *In re TORRY HILL ESTATE. PEMBERTON v. PEMBERTON*

**Parker J. 468**

3. — *Tenant for Life and Remainderman—Capital or Income—Surrender of Lease—Consideration paid to Tenant for Life—Casual Profit—Trustee—Settled Land Act, 1882 (45 & 46 Vict. c. 38), ss. 6, 13, 53.*

Money paid to an equitable tenant for life by a lessee as consideration for accepting a surrender of a lease, which has been granted by the tenant for life under the powers of the Settled Land Acts, does not belong to him as a casual profit, but must be paid by instalments to him and other persons entitled to the rent.

*In re Humloke's Settled Estates*, [1902] 1 Ch. 941, distinguished. *In re RODES. SANDERS v. HOBSON* — — — **Parker J. 815**

4. — *Trust for Sale that may never arise—Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 63.*

A trust for sale that may never arise is not a "trust or direction for sale" within s. 63 of the Settled Land Act, 1882.

*In re Horne's Settled Estate*, (1888) 39 Ch. D. 84, applied. *In re GOODALL'S SETTLEMENT. FANE v. GOODALL* — — **Swinfen Eady J. 440**

— *Highway—Dedication—Public user—Presumption—Churchway—Diversion—Limited dedication* — — — **12**  
*See HIGHWAY.*

— *Trustees, Power to appoint new—Tenant for life donee of power* — — — **280**  
*See TRUSTEE. 5.*

**SETTLED LAND ACT RULES, 1882, r. 2 — 468**  
*See SETTLED LAND. 2.*

**SETTLEMENT—Covenant to settle after-acquired Property—Gift from Husband—Marriage Settlement.**

There is no general rule of construction of

**SETTLEMENT—continued.**

covenants, in marriage settlements, to settle after-acquired property of the wife that a gift from the husband to the wife during coverture is to be excluded from the covenant.

A marriage settlement made in 1882 contained several covenants by the husband and wife to settle "all the real and personal estate whatsoever and wheresoever (if any) to which the wife or the husband in her right should upon the solemnisation of the intended marriage, or at any time afterwards during the intended coverture, be or become absolutely entitled for any estate or interest whatsoever in possession or reversion."

In 1908 the husband transferred into his wife's name, as an absolute gift, stocks and shares of the value of 50,000*l.* :—

*Held*, that they were bound by the covenant. *Coles v. Coles*, [1901] 1 Ch. 711, distinguished. *In re ELLIS'S SETTLEMENT. ELLIS v. ELLIS*

**Swinfen Eady J. 618**

2. — *Covenant to settle Wife's after-acquired Property—Construction—Land in Jersey—Consideration for Transfer necessary—Covenant incapable of being performed—Marriage Settlement.*

A marriage settlement, executed in 1897, contained a covenant whereby it was agreed that all real and personal property to which A. M. H., the intended wife, then was, or at any time during her coverture should be or become, entitled, "except her freehold and leasehold property in Jersey, and any cash, stocks, funds, or other securities, now in the actual possession, or standing in the name of A. M. H." should be assured and transferred by A. M. H., and all other necessary parties, if any, to the trustees of the settlement upon trust to sell and hold the proceeds upon the trusts relating to the wife's trust fund. At the date of the settlement A. M. H. was absolutely entitled to certain real estate in Jersey.

In 1901 she became absolutely entitled to a share in certain other freehold property in Jersey. By the law of that country trusts of this character were not recognized, and all transfers of property were required to be made for adequate pecuniary consideration :—

*Held*, that although the words of the exception in the covenant did not exclude the subsequently acquired property of the wife in Jersey, yet, having regard to the law of Jersey which rendered the transfer of such property to the trustees inoperative, it was not caught by the covenant to settle.

*In re Dunsany's Settlement*, [1906] 1 Ch. 578, applied. *In re PEARSE'S SETTLEMENT. PEARSE v. PEARSE* — — — **Eve J. 304**

3. — *"Eldest Son"—Portions for Younger Children resting at Twenty-one—Period of Distribution postponed—Accelerating Period of Distribution—Mortgage by Younger Son—Younger Son afterwards becoming Eldest Son.*

A testator by his will settled real estates on his daughter for life with remainder to her first and every other son successively in tail male, with remainders over, and with power for her on her marriage by deed to limit a life estate to her



**SETTLEMENT**—*continued.*

husband and to charge 6000*l.* on the estates as portions for her younger children to be payable "at such times or time and in such manner" as she should by deed appoint. In 1845 she married, and by her marriage settlement a life estate was given to the husband and a term of years was limited upon trusts, in the events which happened, after the death of the husband and wife to raise the portions to vest in and be payable to younger sons at twenty-one and daughters at that age or marriage, but payment to be postponed until the deaths of the husband and wife unless the husband should signify in writing that the same should be sooner paid. There were three children, two sons and a daughter, all of whom attained twenty-one before 1882, when the mother died. In 1897 W., the younger son, mortgaged his portion (3000*l.*), the father joining in the mortgage deed to signify that the same should be raisable immediately. In 1900 W., on the death of his elder brother without issue, became the eldest son, and in 1905, on the death of the father, succeeded to the estates as tenant in tail, and afterwards died without issue. The question then arose whether W.'s estate was entitled to have the 3000*l.* raised and paid:—

*Held*, that the wife had power to authorize her husband to accelerate the time for payment of the portions, and that it was competent for the husband to signify by the mortgage of 1897 that W.'s then portion should be immediately raisable; that that deed was equivalent to payment of the portion; and that W.'s legal personal representative was entitled to have the 3000*l.* raised and paid notwithstanding that W. had afterwards become the eldest son. *In re STAWELL'S TRUSTS. POOLE v. RIVERSDALE* Neville J. 534

4. — *Illegitimate Children—Class Gift—After-born Children—Child en ventre sa mère at Date of Settlement—Construction of Settlement.*

By a post-nuptial settlement a fund belonging to the wife was settled as to one third upon trust to pay the income to her daughter E., therein described as the wife of J. K., for life, for her separate use, independently of J. K. or any future husband, and after her death in trust for the children of E. who being sons should attain twenty-one or being daughters should attain that age or marry in equal shares.

A year before the settlement E. went through the ceremony of marriage with J. K., who had been her deceased sister's husband, and at the date of the settlement she was enceinte with a child, who was born a month afterwards and attained twenty-one, and she died without ever having been lawfully married:—

*Held*, that the child was entitled to participate under the settlement.

*In re Shaw*, [1894] 2 Ch. 573, overruled as being inconsistent with *Hill v. Crook*, (1873) L. R. 6 H. L. 265, and *Crook v. Hill*, (1876) 3 Ch. D. 773. *EBBERN v. FOWLER* — C. A. 578

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*See* under COMPANY.

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**SOLICITOR**—*Bill of Costs—Taxation—Application to Tax within One Month after Delivery of Bill—Common Order to Tax—Submission to pay—Exclusion of Statute-barred Items—Special Order—Jurisdiction—Solicitors Act, 1843 (6 & 7 Vict. c. 73), s. 37.*

Where a client applies under s. 37 of the Solicitors Act, 1843, for an order for taxation of his solicitor's bill of costs, whether within one month or after the expiration of one month after the delivery of the bill, the common order to tax, which contains a submission by the client to pay what shall be found due on taxation, is the proper order to be made, and the Court will refuse to insert therein at the instance of the client a direction to the taxing Master to disallow statute-barred items. *In re BROCKMAN* Warrington J. 354

2. — *Lien on Documents—Winding-up—Liquidator—Documents in Solicitor's Hands before Winding-up Order.*

An action was brought by a company against its directors for penalties for acting without qualification. N. acted as solicitor for the company, and documents came into his hands in the course of the action. The company was ordered to be wound up compulsorily and a liquidator was appointed. The liquidator continued the action and retained N., but afterwards discharged him and appointed another solicitor, to whom he required N. to hand over all documents relating to the action. N. claimed a lien for costs. This summons was taken out by the liquidator for an order for the delivery of documents:—

*Held*, that N. had a good lien on, and was entitled to retain, until his costs were paid, all documents which had come into his possession, and on which he had acquired a lien before the order for winding-up, but must deliver those acquired in the course of the winding-up. *In re RAPID ROAD TRANSIT COMPANY* Neville J. 96

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**STREETS**—*New Street—Intended New Sewer—  
Deposited Plans—Unused new Line of Pipes—  
Whether a "Sewer"—Vesting in Local Authority—  
Local Government—Public Health Act, 1875*  
(38 & 39 Vict. c. 55), ss. 4, 13, 16.

When a landowner pursuant to the by-laws  
of a local authority gives notice of his intention  
to lay out a new street and to construct therein  
a line of pipes as a sewer, and his deposited plans  
are passed, and the line of pipes or sewer is con-  
structed under the supervision of the local  
authority and is on completion approved and  
duly authorized to be covered in, such line of  
pipes (though unused) immediately thereupon  
becomes a "sewer" which vests in the local  
authority under s. 13 of the Public Health Act,  
1875, and they have power under s. 16 of the  
Act to connect it with their sewerage system.  
**TURNER v. HANDSWORTH URBAN DISTRICT  
COUNCIL** — — — — **Neville J. 381**

2. — *New Street—Notice to Frontagers to  
metal and make good—No Reference to deposited  
Plan—Sufficiency of Notice, Objection to—When  
to be taken—Local Government—Public Health  
Act, 1875 (38 & 39 Vict. c. 55), ss. 150, 257, 317;  
Sched. IV., Form G.*

A notice by a local authority under s. 150 of  
the Public Health Act, 1875, to the frontagers of  
a new street, not repairable by the inhabitants  
at large, requiring them to metal and make good  
the same should substantially follow Form G in  
Sched. IV. to the Act, and must specifically  
refer to the deposited plans and sections of the  
work required to be done and state that such  
plans and sections are open to their inspection  
at the office of the local authority.

A notice which merely refers in general  
terms to the provisions of s. 150 is insufficient  
and bad.

Frontagers, when served by a local authority  
with a notice under s. 150 of the Public Health  
Act, 1875, referring in general terms to the  
section and requiring them to metal and make  
good a new street, did nothing. The local  
authority then executed the required works, and  
the expenses incurred by them in so doing were  
apportioned by their surveyor amongst the  
frontagers in proportion to their respective  
frontages. The frontagers when served with  
notice of the apportionment did not dispute it and  
did not pay the amount of the proportion alleged  
to be due from them. In proceedings by the  
local authority under s. 257 of the Act to enforce  
payment of the alleged proportion :—

*Held*, that the frontagers were entitled at  
the hearing to object that the notice under  
s. 150 was insufficient and bad.

*Handsworth District Council v. Derrington*,  
[1897] 2 Ch. 438, 449, distinguished on this point.

**STREETS**—*continued.*

**STOURBRIDGE URBAN DISTRICT COUNCIL v.  
BUTLER AND GROVE** — — **Neville J. 87**

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**TENANT**—Landlord and.  
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**TENANT FOR LIFE.**  
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**TENANTS IN COMMON**—Coal—Working of  
part of mine by one co-owner—Adverse  
possession—Account — — — 666  
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land — — — — 713  
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**TRADE MARK** — *Registration — Registrable Mark—Distinctive Mark—"Word or Words"—Use of Word "Royal"—Practice as to Service of Application to the Court that a proposed Mark may be "deemed a distinctive Mark"—Trade Marks Act, 1905 (5 Edw. 7, c. 15), s. 9, sub-s. 5; ss. 11, 60, 68—Trade Marks Rules, 1906, rr. 12, 39.*

The Royal Worcester Corset Company, of Worcester, Massachusetts (a company incorporated in the United States of America), applied for registration in class 38 of the words "Royal Worcester" alone as a trade mark for corsets generally. The words had been used for about five years upon, and in connection with advertisements of, corsets manufactured by the applicant company at Worcester, Massachusetts, and sold in the United Kingdom by the Royal Worcester Trading Company (an English firm) as sole agent or licensee of the applicant company, but never without additional words indicating that the corsets were made in America.

The Board of Trade, pursuant to r. 39 of the Trade Marks Rules, 1906, directed the applicant company to apply to the Court for an order under sub-s. 5 of s. 9 of the Trade Marks Act, 1905, that the words should be "deemed a distinctive mark." The Board of Trade also directed that the application should be served on the Comptroller-General (in the Act referred to as "the registrar"), on the Royal Worcester Trading Company (which had already applied for registration of the same words as a trade mark in connection with corsets and certain articles of clothing), and on the Worcester Royal Porcelain Company, Limited (which was the registered owner of the words "Royal Worcester" as a trade mark for china and pottery, the words being not only distinctive of those things of their manufacture, but connoting the place of their manufacture and the fact that they were supplied to the Royal Family):—

*Held*—(1.) that before the Court can make an order under sub-s. 5 of s. 9 it must be satisfied that the proposed mark is adapted to distinguish the goods of the applicant from similar goods of other persons; (2.) that even if so satisfied, an order ought not to be made if the mark ought not to be registered for some other reason, e.g., because the registration would contravene s. 11; (3.) that the proposed words were not so adapted to distinguish the corsets from those of other persons, and therefore were not in themselves "distinctive words" within the meaning of s. 9; (4.) that the words had not become by user "distinctive," apart from the use of other words not sought to be registered, and were not, therefore, "distinctive" within the meaning of s. 9; (5.) that registration ought also to be refused because of the suggestion in the use of the word "Royal" that the applicant company enjoyed royal patronage (which it was not suggested that it enjoyed) and would be calculated to deceive within the meaning of s. 11; (6.) that the practice of the Board of Trade of indicating upon whom an application to the Court should be served was a convenient practice, and that the two companies served in this case were properly served and entitled to be heard; and (7.) that if an applicant does not serve any person so indi-

**TRADE MARK**—*continued.*

cated the Court can either proceed without any service or direct service to be made according to its own view of what the circumstances require.

*Semble*, that the word "Royal" may be used in such a way as to negative any suggestion of the enjoyment of royal patronage. *In re ROYAL WORCESTER CORSET COMPANY'S APPLICATION TO REGISTER A TRADE MARK.* **Parker J. 459**

**TRADE MARKS RULES, 1906, rr. 12, 39 — 459**  
*See TRADE MARK.*

**TRADE UNION** — *Books and Accounts—Inspection—Right to employ Agent to inspect—Accountant—Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 14; Sched. I., cl. 6.*

By the Trade Union Act, 1871, s. 14, and Sched. I., cl. 6, the rules of a registered trade union must contain provisions in respect of "the inspection of the books and names of members of the trade union by every person having an interest in the funds of the trade union."

The rules of a registered trade union provided that its books and accounts and list of members should be "open to the inspection of all the members thereof, and of all the persons having an interest in the funds, in accordance with the Trade Union Acts":—

*Held*, that members of the society were entitled to inspect the books and accounts by means of an accountant employed by them for the purpose, the accountant undertaking that the information obtained would only be used for informing his clients of the result of his inspection.

*Bevan v. Webb*, [1901] 2 Ch. 59, followed.  
**NOREY v. KEEP — — — Parker J. 561**

**2. — Definition—Objects of Union—Rules—Parliamentary Representation—Ultra vires—Alteration of Rules—Certificate of Registrar—Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 4, sub-s. 3 (a); ss. 13, 23—Trade Union Act Amendment Act, 1876 (39 & 40 Vict. c. 22), s. 16.**

The definition of a trade union contained in the Trade Union Act, 1871, s. 23, or the amended definition in the Trade Union Act Amendment Act, 1876, s. 16, is a limiting and restrictive definition, and it is not competent to a trade union either originally to insert in its objects, or by amendment to add to its objects, something so wholly distinct from the objects contemplated by the Trade Union Acts as a provision to secure or maintain parliamentary representation.

*Steele v. South Wales Miners' Federation*, [1907] 1 K. B. 361, overruled on this point.

The certificate of the registrar under s. 13 of the Trade Union Act, 1871, and the regulations made by the Secretary of State pursuant to that section, of the registry of any rules or alterations of rules is not conclusive as to the validity of the proceedings taken by the society for the passing of such rules or alterations.

*Rosenberg v. Northumberland Building Society*, (1889) 22 Q. B. D. 373, distinguished.  
**OSBORNE v. AMALGAMATED SOCIETY OF RAILWAY SERVANTS — — — C. A. 163**

**TRANSFER**—Land transfer.

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- TRESPASS** — Water company — Unauthorized  
new waterworks—Ancillary main under  
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**TRUST**—Charity.

See CHARITY.

- Resulting trust—Friendly society—Objects  
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- Trustee.

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**TRUSTEE**—Gift to Persons upon trust to sell  
without adding "and their heirs"—Inability of  
Executors of last surviving Trustee to execute  
Trust—Conveyancing and Law of Property Act,  
1881 (44 & 45 Vict. c. 41), s. 30.

The person who is to execute a trust or exercise a power must be a person who is in some way pointed out by the creator of the trust or power as a proper person to execute or exercise it.

A., who died in 1883, devised his residuary estate to B., C., D., and E. (the words "and their heirs" being omitted) upon trust, after B.'s death, for sale as if they were absolute owners. The will gave the trustees powers to postpone the sales, and demise and manage during postponement, and enabled the original number of trustees to be reduced, but not below two, on any appointment of new trustees.

All the trustees, who were also executors of the will, proved it, and in 1908 D., the surviving trustee, died, having appointed executors by his will:—

*Held*, that D.'s executors could not make a good title to a freehold house forming part of the residuary estate of A.

*In re Ingleby and Boak and Norwich Union Insurance Co.*, (1883) 13 L. R. Ir. 326, followed.

*In re Pixon and Tong's Contract*, [1897] W. N. 178; 46 W. R. 187, distinguished.

*Osborne to Rowlett*, (1880) 13 Ch. D. 774, doubted.

*Semble*, that if in the will of A. the devise had been to the four trustees and their heirs, the heir of the surviving trustee could, apart from s. 30 of the Conveyancing and Law of Property Act, 1881, have executed the trust for sale, and by virtue of that section his legal personal representatives would have been substituted for his heir. *In re CRUNDEN AND MEUX'S CONTRACT*

Parker J. 690

2. — Investment—Mortgage—Breach of Trust—Hazardous Security—Depreciation—Valuation—Negligence—"Two Thirds" Limit—Method of Valuation—Repairs—Leases—Trustee Act, 1888 (51 & 52 Vict. c. 59), s. 4—Trustee

**TRUSTEE**—continued.

Act, 1893 (56 & 57 Vict. c. 53), ss. 8, 9—*Judicial Trustees Act*, 1896 (59 & 60 Vict. c. 35), s. 3.

The plaintiffs brought an action for a declaration that an investment of 4400*l.* trust moneys on mortgage of freehold house property was a breach of trust, and that the mode in which the property was subsequently neglected was a further breach of trust, on the ground that the property was not a proper security for any part of the trust funds; that the trustees did not have a valuation made by a properly instructed and independent valuer; that the valuation which was in fact made was unsatisfactory; that the mortgagor ought to have covenanted to keep the property in repair and ought not to have been empowered to grant leases. The property depreciated in value, and two of the mortgaged houses ceased to be let and fell into disrepair, and the beneficiaries contended that the trustees ought to have taken steps from time to time to ascertain the condition of the property:—

*Held*, that it was not proved that the property was of such a nature as to be wholly improper for the investment of trust moneys, but that the valuation obtained by the trustees was not such a valuation as is contemplated by s. 8 of the Trustee Act, 1893. The duties of trustees acting without such a valuation considered, and the trustees held not to have acted as prudent men nor to be entitled to the benefit of s. 3 of the Judicial Trustees Act, 1896.

In applying s. 9 of the Trustee Act, 1893, the Court will be guided by the principles which obtained before the passing of the Trustee Act, 1888, as to the margin of value to be required. Applying these principles, the Court held that the property was a good security for at most 3400*l.* and that the trustees must make good the balance.

*Held*, that the trustees were not liable under the circumstances of this case for not insisting on the covenant to repair, or a clause precluding the mortgagor from granting occupation leases or for neglect to inspect the mortgaged property from time to time.

Methods of valuation and the duties of valuers discussed. *SHAW v. CATES* - Parker J. 389

3. — Investment—Mortgage—Authorized Investment—Breach of Trust—Negligence—Duty of Trustees to make periodical or further Investigations as to Title of the Security or Solvency or Sufficiency of a Mortgagor.

When the Court is dealing with an authorized investment, whether it is an investment authorized in the sense that the trustees may themselves make the investment or whether the Court is dealing with a specific investment transferred to trustees and thereby becoming authorized, although not an investment which they themselves might have made, in either case there is no obligation or duty on the part of trustees to make periodical or further investigations as to either the title of the security or the solvency or the sufficiency of the mortgagor; but if there are circumstances which suggest to a reasonable man that the security is in jeopardy, the duty may arise. The liability of a trustee in dealing with an authorized security must

**TRUSTEE**—*continued*.

really proceed on the footing of wilful default and not upon not making inquiries when he ought to do so.

*Rawsthorne v. Rowley* (reported (1907) 24 Times L. R. 51).

The judgments in this case are set out in a note to *Shaw v. Cates*, [1909] 1 Ch. 389, at p. 409.

\* 4. — *Investment, Improper—Breach of Trust—Power to invest on Real or Leasehold Security* “in his own name or under his legal control” — *Underlease — Contributory Mortgage — Reliance on Solicitor—Report of independent Valuer—Trustee Act, 1893* (56 & 57 Vict. c. 53), s. 8—*Relief under Judicial Trustees Act, 1896* (59 & 60 Vict. c. 35), s. 3.

The trustee of a will was directed to invest the trust funds “in his own name or under his legal control” in (amongst other modes of investment) freehold, copyhold, leasehold, or chattel real securities. He invested a sum of 2000*l.*, part of the trust funds, on a contributory mortgage of certain leasehold flats held under underleases at substantial rents. The security was introduced by a surveyor to the trustee’s solicitor, who recommended it to the trustee and suggested the same surveyor as a suitable person to value the property on the trustee’s behalf. The trustee appointed the surveyor and it was arranged that he should be paid a fee only in the event of the mortgage going through. The surveyor made his report, from which it appeared that the property was of a speculative character, but the surveyor nevertheless advised that it formed a good security for the sum proposed to be advanced by the trustee and his co-mortgagee. The trustee, relying on the advice of his solicitor and on the report, advanced the 2000*l.* The mortgagor subsequently became insolvent, and the trustee and his co-mortgagee were compelled to sell the property under their power of sale, with the result that the greater part of the 2000*l.* advanced by the trustee was lost. In an action against the trustee for breach of trust:—

*Held*, that the investment was improper and a breach of trust; that in making it the trustee, although he had acted honestly, had not acted “reasonably,” and that he was therefore not entitled to be relieved or excused from personal liability under s. 3 of the Judicial Trustees Act, 1896. *In re DIVE*. *DIVE v. ROEBUCK*

Warrington J. 328

5. — *Power to appoint new Trustees—Settlement—Tenant for Life Donee of Power—Executors of last surviving Trustee acting as Trustees of Settlement—Appointment by Donee of new Trustees—Validity of Appointment—Conveyancing and Law of Property Act, 1881* (44 & 45 Vict. c. 41), s. 30, sub-s. 1—*Trustee Act, 1893* (56 & 57 Vict. c. 53), ss. 10, 25.

By a settlement real estate was in 1874 conveyed to A. and B. in fee upon trust that they and the survivor of them and the heirs and assigns of such survivor should hold the trust estate upon certain trusts under which C. was the first tenant for life; and by the same settlement a power to appoint new trustees was vested

**TRUSTEE**—*continued*.

in C. and D. during their joint lives. B. survived A. and died in 1905, and the executors of his will acted as the trustees of the settlement. In 1908 C. and D. in exercise of the power by deed appointed two persons to be new trustees of the settlement and made the usual vesting declaration. The executors of B. objected that the appointment of new trustees was a nullity because they were by virtue of s. 30 of the Conveyancing Act, 1881, the existing trustees of the settlement, and that, though willing to retire, they could not be displaced except by the Court or by a deed to which they were made parties and retired:—

*Held* that, although the executors were trustees of the settlement until the new trustees were appointed, the deed was a valid exercise of the power to appoint new trustees, and operated forthwith to oust the executors for all purposes from the trust. *In re ROUTLEDGE’S TRUSTS*. *ROUTLEDGE v. SAUL* — *Neville J.* 280

— Industrial and provident societies—Dissolution—Appointment of new trustee—Vesting order — — — 701  
*See INDUSTRIAL AND PROVIDENT SOCIETIES.*

— Retainer—Debt due from legatee to estate—Liability to account—Bankruptcy—Acceptance of dividend — Assent to composition — — — 806  
*See WILL.* 11.

— Settled land — Trust for sale that may never arise — — — 440  
*See SETTLED LAND.* 4.

**ULTRA VIBES**—Company — Income bond — Construction—Dividends out of capital  
*See COMPANY.* 5. 754

— Trade union—Objects of union — Rules—Parliamentary representation — 163  
*See TRADE UNION.* 2.

— Water company—“Supply of water”—Supplying water outside statutory limits—Injunction — — — 636  
*See WATER.* 3.

— Water company—Unauthorized new water-works—Ancillary main under public footpath—Trespass — — — 70  
*See WATER.* 2.

**UNCERTAINTY**—Religion, Advancement of—Charitable bequest — — — 567  
*See CHARITY.* 2.

**UNDERLEASE**—Trustee—Investment — Breach of trust—Contributory mortgage 328  
*See TRUSTEE.* 4.

**UNION**—Trade union.  
*See under TRADE UNION.*

**USER**—Highway—Dedication — Public user—Presumption—Settled land — Church-  
way — Diversion — Limited dedication  
*See HIGHWAY.* 12



**USER**—*continued.*

- Patent—Alleged infringement—Defence of prior user—Particulars - - - 801  
See PATENT. 1.
- Statutory navigation company, Prescriptive claim against—Prescriptive claim to take surplus water only—User unlimited - - - - - 775  
See PRESCRIPTION.

**VALUATION**—Trustee—Investment—Breach of trust—Report of independent valuer—Underlease—Contributory mortgage  
See TRUSTEE. 4. 328

- Trustee—Investment—Breach of trust—"Two thirds" limit—Method of valuation—Depreciation—Repairs - 389  
See TRUSTEE. 2.

**VENDOR AND PURCHASER**—*Contract for Sale of Real Estate—Non-completion on Appointed Day—Interest on Purchase-money—Legal Proceedings by Purchaser—Default of Purchaser—Reasonable Conduct—Settled Account.*

On a contract for sale of real estate the purchaser took an objection which went to the root of the title. Neville J. held that the objection was well founded and the title was bad; the Court of Appeal reversed this decision and the House of Lords affirmed the judgment of the Court of Appeal. By the conditions of sale it was provided that if the purchase should not be completed at the time appointed the purchaser should pay interest on the remainder of the purchase-money at the rate of 5 per cent. per annum from that time until the same should be paid, provided always that if the delay in completion should arise from any cause other than the neglect or default of the purchaser, and if the purchaser should at his own risk and expense deposit the remainder of the purchase-money at any bank upon a deposit account bearing interest and should give notice thereof to the vendor, the vendor should from the time of the notice only be entitled to such interest as should be actually produced by the amount so deposited.

The day fixed for completion was September 2, 1907. On September 4, 1907, after the decision of Neville J., the purchaser placed the balance of the purchase-money, 99,000*l.*, on deposit with a bank and gave notice to the vendors. On February 28, 1908, he took the money off the deposit account and paid it into Court under an order made in lunacy proceedings. The purchase was not yet completed, and the vendors now claimed interest at 5 per cent. per annum on the balance of the purchase-money from the date fixed for completion up to February 28, 1908. The purchaser maintained that they were only entitled to the interest actually produced by the deposit account, and pleaded a settled account:—

*Held*, that a decision by the Court that a requisition is untenable is equivalent to a decision that the purchaser is in default in refusing to complete until the objection is removed; that default involves breach of some duty owed to another; that a person guilty of a breach of duty is guilty of default, but in considering

**VENDOR AND PURCHASER**—*continued.*

whether he is under that duty the Court will be guided by the nature of the contract and all the circumstances of the case; that there is no rule that conduct amounting to default must be conduct which is unreasonable; that the words "doing what is reasonable under the circumstances" used by Bowen L.J. in *In re Young and Harston's Contract*, (1885) 31 Ch. D. 168, 174, mean the same thing as doing what a person ought to do having regard to his relations to others, and do not suggest any standard based on what a prudent man would do for his own protection; that the rule there suggested that a vendor of real estate is not guilty of default so long as he acts reasonably having regard to his relations towards other persons interested in the contract applies to purchasers as well as to vendors; that in the present case the delay had been caused by the conduct of the purchaser, who though acting reasonably for his own protection had committed a breach of duty towards the vendors in repudiating the contract although the title was good; and that the settled account under the circumstances was no defence to the claim for interest at 5 per cent.

*Bennett v. Stone*, [1902] 1 Ch. 226; [1903] 1 Ch. 509, explained. *In re BAYLEY-WORTHINGTON AND COHEN'S CONTRACT* - Parker J. 648

2. — *Practice—Sale of Real Estate—Vendor's Action for Specific Performance—Title accepted and Conveyance approved—Form of Order.*

Where a motion for judgment in default of defence is made in a vendor's action for specific performance of an agreement for the sale of real estate, the title to which has been accepted by the purchaser, the minutes should provide for the delivery of a conveyance of the property to the purchaser on payment by him of the purchase-money, interest, costs, and damages (if any).

Form 6 in 3 Seton on Judgments and Orders, 6th ed. p. 2240, amended in this respect. *COOPER v. MORGAN* - - Warrington J. 261

— Costs—Taxation—Lands Clauses Act—Death of vendor before completion—Vendor's will—Costs of probate - 55  
See COSTS.

— Lease—Option to purchase landlord's interest—Condition precedent—Specific performance - - - - - 284  
See LANDLORD AND TENANT. 2.

**VESTING**—Will—Trust for sale of land—Power to postpone—Settlement of proceeds—Share vested in possession - - 631  
See WILL. 10.

**VESTING ORDER**—Industrial and Provident Societies—Dissolution—Appointment of new trustee—Bona vacantia - 701  
See INDUSTRIAL AND PROVIDENT SOCIETIES.

**VOLUNTARY WINDING-UP**—Company - 491  
See COMPANY. 6.



**WATER**—Supply—Water Company—Special Act—School—"Domestic purposes"—Dwelling-house used for "business for which water is required"—Bognor Water Act (54 & 55 Vict. c. clxxviii.), ss. 60, 61.

The special Act of a water company provided (s. 60) that they should, on the application of the owner or occupier of a dwelling-house within their area of supply, furnish him with a sufficient supply of water for domestic purposes at specified rates. But by s. 61 of the Act the company could not be compelled to furnish a supply "otherwise than by agreement, where any part of such dwelling-house is used for any trade, manufacture, or business for which water is required":—

*Held*, that the keeping of a boarding school for boys in which water was used for the domestic purposes of all the inmates was not carrying on a "business for which water is required" within the meaning of s. 61 of the special Act, and the occupier of the house was therefore entitled to be supplied by the water company with water to his house and premises at a rate not exceeding that specified in s. 60.

*Chester Waterworks Co. v. Chester Union*, (1907) 96 L. T. 566; (1908) 98 L. T. 701, discussed and followed. **FREDERICK F. BOGNOR WATER COMPANY** — — — — **Eve J. 149**

**2. — Water Company—Special Acts—Unauthorized new Waterworks—Ancillary Main under Public Footpath—Soil in Plaintiff—Trespass—Ultra vires—Plaintiff's Right to sue without Attorney-General—Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), ss. 28, 29.**

SECT. 28 of the Waterworks Clauses Act, 1847, merely enables a water company to lay pipes under streets in connection with the undertaking authorized by their special Acts, and if they are being laid in connection with unauthorized works, the owner of the soil can sue the water company in trespass, raise the question of ultra vires, and obtain an injunction without joining the Attorney-General.

*Liverpool Corporation v. Chorley Waterworks Co.*, (1852) 2 D. M. & G. 852, 860, and *Cardiff Corporation v. Cardiff Waterworks Co.*, (1850) 5 Jur. (N.S.) 953; 4 De G. & J. 596, applied.

The fact that the damage is small is immaterial: *Goodson v. Richardson*, (1874) L. R. 9 Ch. 221, applied.

*Semble*, a public street or footpath is "land dedicated to public use" within the meaning of s. 29, so that pipes in connection with authorized works could be laid without the consent of the owner of the soil. **MARRIOTT v. EAST GRINSTEAD GAS AND WATER COMPANY**

**Swinfen Eady J. 70**

**3. — Water Company—Waterworks—Statutory Powers—"Supply of Water"—Supplying Water outside Statutory Limits—Ultra vires—Injunction—West Gloucestershire Water Act, 1884 (47 & 48 Vict. c. cxxiv.), ss. 3, 4, 5, 6, 28, 34, 36, 56—West Gloucestershire Water Act, 1899 (62 & 63 Vict. c. clviii.), ss. 4, 12—Metropolis Gas Act, 1860 (23 & 24 Vict. c. 125), s. 6—"Supply of Gas."**

A water company authorized by their special Act to supply water to certain places, defined by

**WATER—continued.**

the Act to be the limits of the Act, cannot supply water outside those limits although not expressly forbidden by the Act so to do.

A water company, authorized by their special Acts to erect waterworks and supply water within certain limits which included the parish of A., agreed to supply water to W., the owner of property in the adjoining parish of H., and accordingly extended their main in the parish of A. to the boundary where it adjoined the parish of H., and then, at the cost of W., laid a main some distance along a highway in the parish of H. and thence laid pipes to W.'s property:—

*Held*, that the water company, on the construction of their special Acts, were not entitled to supply water outside their statutory limits.

*Held*, also, that the water company were supplying water to W., not at the point where their main reached the boundary in the parish of A., but at the terminals on W.'s property where he received and applied it to his use.

*Held*, therefore, that the water company were acting ultra vires, and an injunction was granted at the suit of the Attorney-General.

The analogy of the decision of the House of Lords in *Gas Light and Coke Co. v. South Metropolitan Gas Co.*, (1889) 62 L. T. 126, on the expression "supply of gas" in the Metropolis Gas Act, 1860, applied to the expression "supply of water" in the special Acts of the water company. **ATTORNEY-GENERAL v. WEST GLOUCESTERSHIRE WATER COMPANY** — **Neville J. 636**

— Statutory navigation company, Prescriptive claim against—Prescriptive claim to take surplus water only — User unlimited — — — — **775**  
*See* **PRESCRIPTION.**

— Watercourse.  
*See* **UNDER WATERCOURSE.**

**WATERCOURSE** — Artificial Channel — Mill Stream—Riparian Proprietors—Title to Bed of Stream—Easement—Right to Flow of Water—Presumption—Trespass—Injunction—Damages.

The plaintiffs were the owners in fee of an ancient tannery situated on either bank of a mill stream, and the defendants were occupiers of an ancient corn mill further down the stream. The channel of the stream was an artificial one, constructed several centuries ago, and passing through the lands of various proprietors before reaching the tannery and the mill. The owners or occupiers of the mill were also in possession of and exercised the sole control over a weir and sluice gates built across the river E. at the point where the mill stream commenced, and they regulated the flow of the water into the mill stream and cleansed the bed and banks from the weir to the tannery. In November, 1907, the defendants cut off the water supply and, entering on the bed of the stream within the plaintiffs' premises, removed therefrom certain pipes by means of which the plaintiffs had been in the habit of obtaining water for their tannery. In an action by the plaintiffs for an injunction to restrain the interference with their right to abstract water, and for trespass and damages:—

*Held*, upon the facts, and having regard to

**WATERCOURSE**—*continued*.

the conduct of the parties, and especially to the notorious and constant user of the water by the plaintiffs and their predecessors for nearly 250 years, that (1.) the plaintiffs were the owners of the bed of the stream so far as it ran through their land; and (2.) the Court was bound to infer that the mill stream was originally constructed for the mutual benefit of the tanner and the miller, and that the plaintiffs were entitled, under a reservation made or agreement entered into when the channel was constructed, to a right to use the water for all reasonable purposes, not causing any sensible or material injury to the miller.

*Baily & Co. v. Clark, Son & Morland*, [1902] 1 Ch. 649, followed.

*Burrows v. Lang*, [1901] 2 Ch. 502, distinguished.

The rule in *Rylands v. Fletcher*, (1868) L. R. 3 H. L. 330, that a person who for his own purposes brings on his land and collects there anything likely to do mischief if it escapes must keep it in at his peril, does not extend to making the owner of land liable for consequences brought about by the collecting and impounding on his land by another of water, or any other dangerous element, not for the purposes of the owner, but for the purposes of that other person.

*Semble*, where water flows through an artificial channel past the lands of several proprietors to serve the purposes of a proprietor lower down, the proper grant to presume, in the absence of all evidence as to the conditions upon which the channel was originally made, would be the grant of an easement or right to the running of water; and, *prima facie*, every proprietor of land on the banks of such a channel would be entitled to the moiety of the bed of the channel adjoining his land. *WHITMORES (EDENBRIDGE), LIMITED v. STANFORD* — — — **Eve J. 427**

**WESLEYAN METHODIST CHAPEL**—Model deed—Power of sale—Consent of Charity Commissioners—Exemption  
*See LAND REGISTRY.* **454**

**WEST GLOUCESTERSHIRE WATER ACTS**—“Supply of water”—Supplying water outside statutory limits—Injunction  
*See WATER.* **3.** **636**

**WIFE**—Husband and wife.  
*See under HUSBAND AND WIFE.*

**WILL**—*Class Gift—Revocation by Codicil—Intestacy—Will—Construction.*

D. by his will directed his trustees to divide his residuary estate into as many equal shares as he should have daughters who should survive him, or should have died in his lifetime leaving issue him surviving, and to appropriate one such share to each such daughter. He then directed each daughter's share to be settled on herself and her children. By a codicil he revoked the gift of a share to his daughter L. All his daughters, including L., survived him:—

*Held*, that the gift was to a class, and therefore there was no lapse as to the revoked share,

**WILL**—*continued*.

but the residue was divisible among the daughters other than L. in equal shares.

*Ramsay v. Shelmerdine*, (1865) L. R. 1 Eq. 129, not followed. *In re DUNSTER.* **BROWN v. HEYWOOD** — — — **Neville J. 103**

**2.** — *Class, Gift to—Inquiry—Ascertainment of Persons entitled to Legacy—Costs—Residue—“Otherwise direct”—Construction of Will—Rules of the Supreme Court, Order LXV., r. 14B.*

By his will the testator gave his residuary real and personal estate to trustees upon trust for sale and conversion and to invest the proceeds after payment thereof of his funeral and testamentary expenses, debts, and legacies and to pay the income to his wife, and after her death to raise certain legacies, and upon further trust to raise 6000*l.* for the benefit of a class of persons therein described, and to pay the ultimate residue to his brother and sisters in equal shares. The testator died in 1891, and his widow in 1905. In November of that year an order was made directing an inquiry who were the beneficiaries composing the class entitled to the 6000*l.* The inquiry was completed, and the trustees now asked for taxation of costs and a declaration that the costs down to the order of November, 1905, should be paid out of the ultimate residue, and that the subsequent costs should be paid out of the funds representing the 6000*l.*:—

*Held*, that the costs of the inquiry were testamentary expenses and ought to be paid out of residue; that Rules of the Supreme Court, Order LXV., r. 14B, had not put an end to the power of the Court to make an order carrying out the intention of the testator; and that all the costs of ascertaining the members of the class, except so far as they had been increased by incumbrances on the shares, must be paid out of the residue and not out of the 6000*l.* *In re VINCENT.* **ROHDE v. PALIN** — **Parker J. 810**

**3.** — *Exoneration—Contrary or other Intention—Mortgage Debt on Whiteacre—Direction to pay out of Blackacre—Insufficiency of Blackacre—Locke King's Acts—Real Estate Charges Act, 1854 (17 & 18 Vict. c. 113), s. 1.*

A direction that a mortgage debt on Whiteacre shall be paid out of the proceeds of sale of Blackacre exonerates Whiteacre to the extent of those proceeds, but does not indicate a general “contrary or other intention” within the Real Estate Charges Act, 1854, s. 1, so as to enable the devisees of Whiteacre to come on the general personal estate for any deficiency.

*Allen v. Allen*, (1862) 30 Beav. 395, 403, explained. *In re BIRCH.* **HUNT v. THORN**  
**Swinfen Eady J. 787**

**4.** — *General Legacy—Gift of Shares—Change in Value of Shares—Will speaking from Death—Contrary Intention—Will—Construction—Wills Act, 1837 (1 Vict. c. 26), s. 24.*

By his will the testator gave twenty-five shares in a company to W. At the date of the will these shares were of the value of 50*l.* each with 5*l.* credited as paid up. After the date of the will the shares were divided into 10*l.* shares with 1*l.* paid up and remained in that form at

**WILL—continued.**

the testator's death. After the date of his will he sold several 50*l.* shares and, subsequently, several 10*l.* shares. On a summons to ascertain whether the legacy was a gift of shares as they existed at the date of the will or at the date of the testator's death:—

*Held*, that this was a general legacy in language appropriate to describe the state of things which existed at the death and did not shew a contrary intention within s. 24 of the Wills Act, 1837, and therefore that W. only took 10*l.* shares as they existed at the death.

*In re Portal and Lamb*, (1885) 30 Ch. D. 50, explained. *In re GILLINS*. **INGLIS v. GILLINS**  
**Warrington J. 345**

**5. — Illegitimate Children—Class Gift—Mother past Child-bearing—Construction of Will.**

E., by her will dated in 1907, gave her residuary estate to trustees "In trust for and to be equally divided between and among the children of my sisters, Mary Ann Burns, Clara Davenport and Sarah Pugh, and of my brother William Sales and the issue of such of them as shall die in my lifetime leaving issue, such issue taking his her or their parents' share." Mary Ann Burns was at the date of the will a widow nearly sixty-eight years of age; she had been married in 1869, having had two children by her husband before marriage, and had no other children. She was living with E. at the date of her will and her death. E. knew all the facts, and was on affectionate terms with the children. The other sisters and the brother all had legitimate children living:—

*Held*, that M. A. Burns' two illegitimate children took shares on the ground that there were not, and never could be, any legitimate children to answer the description. *In re EVE*. **EDWARDS v. BURNS** — **Swinfen Eady J. 796**

**6. — Joint Tenancy or Tenancy in Common — Gift to Persons who would under the Statute of Distributions be the Next of Kin of Testator's Daughter if she had died unmarried—Class—Will—Construction.**

The rule of construction established by *Bullock v. Downes*, (1860) 9 H. L. C. 1, is that, where there is a gift to a class to be ascertained by reference to the Statute of Distributions, not only the objects of the gift, but the shares and manner in which those objects take, are *prima facie* to be ascertained according to the statute. Such a rule of construction ought not to be frittered away by nice distinctions as to the particular words used. The members of a class to be so ascertained will therefore, unless the will shews clear evidence of a contrary intention, take as tenants in common and not as joint tenants. *In re NIGHTINGALE*. **BOWDEN v. GRIFFITHS** — — — **Neville J. 385**

**7. — Latent Ambiguity — Name — Misdescription—Extrinsic Evidence—Instructions—Admissibility—Will—Construction.**

A testator appointed one Dr. Alfred Ofner one of his executors and gave him a legacy of 200*l.*, and, among other legacies to various nieces and a nephew nominatim, he gave "to my grandnephew Robert Ofner" 100*l.*, and to

**WILL—continued.**

another "grandnephew Curt Ofner" 100*l.* The testator had no grandnephew or other relative of the name of "Robert" Ofner, but he had four grandnephews, Alfred Ofner and Curt Ofner, who were correctly so described in the will, Richard Ofner, a brother of Alfred Ofner, and Botho Ofner. It was proposed to put in evidence a memorandum in the testator's handwriting that had been given by him to his solicitors as instructions for his will, in which the following words occurred: "to my grandnephew Dr. Alfred Ofner . . . . 200*l.* . . . . to his brother Robert Ofner 100*l.*":—

*Held* (reversing the decision of *Swinfen Eady J.*), that this document was admissible, not as evidence of intention, but to find out who the "grandnephew" was whom the testator had wrongfully described by the name "Robert," and if that were done it was clear that the brother of Dr. Alfred Ofner was intended to be the legatee, and that "Robert" was a mistake for "Richard."

The fact that this document also happened to be instructions for the will did not make it *ipso facto* any the less admissible, not as instructions, but as a contemporaneous and serious document explanatory of the meaning the testator had wrongly attributed to the name "Robert" when describing this legatee. *In re OFNER*. **SAMUEL v. OFNER** — — — — **C. A. 60**

**8. — Mixed Fund — Implied Charge of Legacies—Express Charge of Debts—Period of Limitation—Limitation Act, 1623 (21 Jac. 1, c. 16), s. 3—Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 8—Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 2, sub-s. 3.**

A testator devised and bequeathed "all the real and personal estate to which at my death I shall be entitled" to his trustees upon trust for sale and conversion and out of the proceeds to pay "my debts and funeral and testamentary expenses" and to hold the residue thereof in trust for certain residuary legatees. He then bequeathed certain pecuniary legacies.

The testator died in 1901. His only asset was a reversionary share of real estate which fell into possession in 1905 and was sold in 1908.

The legacies and certain simple contract debts incurred more than six but less than twelve years ago being still unpaid:—

*Held*, that notwithstanding the Land Transfer Act, 1897, s. 2, sub-s. 3, the charge of debts on the real estate was not nugatory, but had the effect of bringing the debts within the Real Property Limitation Act, 1874, s. 8, so that as against the real estate the period of limitation was twelve years, and they were still recoverable.

*In re Stephens*, (1889) 43 Ch. D. 39, and *In re Kempster*, [1906] 1 Ch. 446, 449, applied.

*Held*, also, that notwithstanding the absence of the words "rest and residue" the general devise and bequest of the real and personal estate as a mixed fund in one mass was clearly residuary, so that the legacies were charged upon and payable out of the real estate.

*Greville v. Browne*, (1859) 7 H. L. C. 689; *Elliott v. Dearsley*, (1880) 16 Ch. D. 322; and *In*



**WILL—continued.**

*re Grainger*, [1900] 2 Ch. 756, 767; [1902] A.C. 1, applied. *In re BALLS. TREWBY v. BALLS Swinfen Eady J. 791*

9. — *Specific Devise*—"House and effects known as Cross Villa"—*Subsequent Alteration of Premises*—Wills Act, 1837 (1 Vict. c. 26), s. 24—*Contrary Intention*—*Construction of Will*.

The testator by his will, dated in 1901, made the following devise to his wife for life, with remainder to his daughter: "House and effects known as Cross Villa situated in T." At the date of his will he was possessed of half an acre of ground with a house upon it, the premises being known as "Cross Villa." In 1906 upon a part of the ground, which he separated from the rest by a hedge, he erected two semi-detached dwelling-houses which he named Ashgrove Villas. He died in 1908. Upon a summons to determine the effect of the devise:—

*Held*, that it passed the whole of the property with all the buildings thereon. *In re EVANS. EVANS v. POWELL — — — Joyce J. 784*

10. — *Trust for Sale of Land*—*Power to postpone*—*Settlement of Proceeds*—*Share vested in Possession*—*Right of Beneficiary to insist on immediate Sale*.

Where land is devised to trustees in trust for sale with a discretionary power of postponement, and the proceeds are settled in trust for various beneficiaries, the vesting in possession of the share of one of the beneficiaries does not put an end to the power of postponement, or entitle that beneficiary to call either for an immediate sale of the entirety or for a conveyance of an undivided share in the land.

*Trower v. Knightley*, (1821) 6 Madd. 134; *Lantsbery v. Collier*, (1856) 2 K. & J. 709; *Taite v. Swinstead*, (1859) 26 Beav. 525; *In re Cotton's Trustees and London School Board*, (1882) 19 Ch. D. 624; *In re Lord Sudeley and Baines & Co.*, [1894] 1 Ch. 334; and *In re Tweedie and Miles*, (1884) 27 Ch. D. 315, discussed and applied. *In re HORSNAILL. WOMERSLEY v. HORSNAILL Swinfen Eady J. 631*

11. — *Trustee—Retainer—Debt due from Legatee to Estate—Liability to account—Satisfaction of Debt—Bankruptcy—Composition—Acceptance of Dividend—Assent to Composition—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 18, 19, 30.*

Two trustees of a will misappropriated and lost part of the trust funds. A receiving order was made against them under the Bankruptcy Act, 1883, and a composition was agreed to and approved by the Court under which a dividend of 6s. in the pound was to be accepted by the creditors in full discharge of their debts. New trustees of the will were appointed, and they received the dividend of 6s. in the pound. The estate became divisible, and the trustees claimed to retain the share of it to which one of the defaulting trustees was beneficially entitled in order to make good the loss which he had caused to the estate:—

*Held*, that by receiving the dividend the trustees had assented to the composition; that the debt due to the estate by the defaulting

**WILL—continued.**

trustee was no longer in existence; and that he was therefore entitled to have his share of the estate paid to him. *In re SEWELL. WHITE v. SEWELL — — — Parker J. 806*

12. — *Words of Futurity—Gift to Nephews and Nieces—Substitutionary Gift to Children in case any Nephew or Niece "shall die in my lifetime"*—*Niece dead at Date of Will leaving Child—Class—Will—Construction*.

Testator gave his residuary estate in trust for such of his nephews and nieces "as shall be living at my decease and have attained or shall attain the age of twenty-one years" equally between them if more than one. "Provided always that if any of my nephews or nieces shall die in my lifetime leaving a child or children who shall survive me and attain the age of twenty-one years then and in every such case the last mentioned child or children shall take (and if more than one equally between them) the share which his her or their parents would have taken in my residuary estate if such parents had survived me and attained the age of twenty-one years":—

*Held*, that the children, who attained twenty-one and survived the testator, of a nephew or niece already dead at the date of the will were entitled to share in the residue.

*In re Lambert*, [1908] 2 Ch. 117, and *Loring v. Thomas*, (1861) 1 Dr. & Sm. 497, followed.

*In re Cope*, [1908] 2 Ch. 1, distinguished.

*Quære* whether a distinction should not be drawn in all such cases between a gift to children and to nephews and nieces, a class much more remote than that of the testator's own descendants. *In re METCALFE. METCALFE v. EARLE Joyce J. 424*

— Annuities.

*See under ANNUITY.*

— Married woman—Will—Appointment—Separate estate—"Liable for her debts or other liabilities"—*— — — 1*  
*See HUSBAND AND WIFE. 2.*

— Power of appointment.

*See under POWER OF APPOINTMENT.*

— Probate.

*See under PROBATE.*

— Specific legacy—Interval between death of testator and assent of executor—Cost of upkeep and preservation — 819  
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**WINDING-UP**—Company.

*See under COMPANY.*

**WORDS**—"Assign" — — — 544  
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— "Domestic purposes" — — — 149  
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— “Eldest son” — — — —	534
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— “Minerals” — — — —	218
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